# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1907.**

**No. 167.**

EDWIN T. MANKIN AND HENRY M. MAGIE, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MANKIN CONSTRUCTION COMPANY, ET AL., PLAINTIFFS IN ERROR,

*vs.*

THE UNITED STATES FOR THE USE AND BENEFIT OF LUDOWICI-CELADON COMPANY, J. L. MOTT IRON WORKS, AND THE N. O. NELSON MANUFACTURING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**FILED MAY 27, 1908.**

**(21,196.)**

# (21,196.)

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UNITED STATES OF AMERICA, *Fifth Judicial Circuit:*

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday of November, 1907, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, Circuit Judges.

No. 1762.

EDWIN T. MANKIN ET AL., Plaintiffs in Error,
*versus*
LUDOWICI-CELADON CO. ET AL., Defendants in Error.

Be it remembered, That heretofore, to-wit: on the 13th day of January, 1908, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Southern District of Mississippi was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

UNITED STATES OF AMERICA.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

EDWIN T. MANKIN AND HENRY M. MARGIE DOING BUSINESS UNDER THE FIRM NAME OF MANKIN CONSTRUCTION COMPANY AND THE TITLE GUARANTEE & TRUST COMPANY, DEFENDANTS.

Appellants.

versus

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE LUDOWICI-CELADON COMPANY, PLAINTIFF N. O. NELSON MFG. COMPANY, AND J. L. MOTT IRON WORKS, INTERVENERS.

Appellee.

On Appeal to the United States Circuit Court of Appeals, for the Fifth Circuit.

TRANSCRIPT OF RECORD.

## CAPTION.

BE IT REMEMBERED, That at a regular term of the Circuit Court of the United States in the Fifth Circuit thereof, and in and for the Southern District of Mississippi, at Jackson, begun and holden at Jackson, Mississippi, on the 4th day of November, A. D. 1907, and which term adjourned on the .... day of of November, A. D. 1907; the Honorable Henry C. Niles, United States District Judge, for the State of Mississippi, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

United States of America, for the Use and Benefit of the Ludowici-Celadon Company,

vs. No. 6498.

Edwin T. Mankin and Henry M. Margie of Richmond, Virginia, doing Business Under the Firm Name of Mankin Construction Company, and the Title Guaranty & Trust Company, of Scranton, Pennsylvania, Defendants. N. O. Nelson Manufacturing Company and The J. L. Mott Iron Works, Interveners.

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2 PETITION OF COMPLAINANTS.

In the Circuit Court of the United States, for the Southern District of Mississippi.

To May Term, 1907.

United States for the Use and Benefit of Ludowici-Celadon Company, Plaintiff,

vs.

Edwin T. Mankin, and Henry M. Magie, of Richmond, Virginia, Co-Partners, Doing Business Under the Firm Name of Mankin Construction Company, and the Title Guaranty and Trust Company, of Scranton, Pennsylvania, a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

Plaintiff suing for the use and benefit of Ludowici-Celadon

Company, a corporation duly incorporated under the laws of the State of Illinois, complains of Edwin T. Mankin, and Henry M. Magie, of Richmond, Virginia, co-partners doing business under the firm name of Mankin Construction Company and the Title Guaranty and Trust Company, incorporated, of Scranton, Pennsylvania, alleging as its cause of action, that said Ludowici-Celadon Company is engaged in the manufacture and sale of roofing tile and similar clay products, and that during the month of December, A. D. 1905, and January and February, A. D. 1906, being then engaged in said business, at the instance and request of one, W. E. Smythe, of Natchez, Miss., said usee sold and delivered certain material and supplies to said Smythe to an amount aggregating the sum of one thousand and forty-nine and 78/100 ($1049.78) dollars as will appear by reference to the account properly verified by affidavit and hereto annexed as Exhibit "A."

Plaintiff further shows that the supplies and materials so furnished and sold by said Ludowici-Celadon Company to said W. E. Smythe were roofing-tiles manufactured for use upon and in the construction of that public building owned by the United States of America, situated in the City of Natchez, State of Mississippi, and used and occupied by said United States, as a post-office. That the contract for the construction of said public building was awarded by the United States acting through its properly constituted authorities to the Mankin Construction Company, of Richmond, Virginia, herein named as defendant in this action. That before entering into the construction of said building, the said Mankin Construction Company entered into a contract with L. M. Shaw, secretary of the treasury of the United States in which said
3 Mankin Construction Company, a partnership composed of Edwin T. Mankin and Henry M. Magie, hereinbefore named, did expressly covenant and agree with said secretary of the treasury to furnish all the labor and material and do and perform all the work required for the construction complete of the post-office at Natchez, Mississippi.

Plaintiff further alleges and declares that the United States required of said Mankin Construction Company that it give a bond conditioned for the faithful performance of all covenants and conditions contained in the contract hereinbefore mentioned, and that in accordance with said requirements of the United States, such bond was executed by said Mankin Construction Company, as principal, with the hereinbefore named The Title Guaranty and Trust Company, of Scranton, Pennsylvania, as surety; said bond being in the penal sum of

seventeen thousand ($17,000.00) dollars, and being conditioned for the performance of all the undertakings and conditions contained in the contract herebefore mentioned, and the performance of all the work and furnishing all labor and materials required by said contract, and further conditioned for promptly making payment to all persons supplying them, the said Mankin Construction Company, labor or materials in the prosecution of the work contemplated by said contract; which contract and bond herein mentioned are filed herewith as Exhibits "B" and "C," respectively.

Plaintiff further alleges that said Mankin Construction Company in the course of the erection of the public building herein mentioned, entered into a contract with said W. E. Smythe, for the construction of certain parts of said building and erecting the roof on the same, and that the tiles furnished to said Smythe, as hereinbefore mentioned were actually used upon and in the construction of said building, and that no part of them were returned or refused, but that said materials now form a part of said building as completed.

Plaintiff further alleges that neither said Smythe, nor said Mankin Construction Company, nor said Title Guaranty & Trust Company, nor any other person, firm or corporation has ever paid Ludowici-Celadon Company for all or any part of said materials so supplied by them and used upon the structure herein mentioned, although, each of said parties herein named and defendants to this action have been frequently requested so to do.

Plaintiff avers that on the 16th day of August, A. D. 1906, acting through its duly constituted agents and attor-
4 ney, the said Ludowici-Celadon Company made affidavit, as required by that certain act of the United States, entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works," approved August 13th, 1894, as amended by an Act of Feb. 24th, 1905; and that in accordance with the provisions of said statutes, was furnished by the Secretary or War, of said United Sates, certified copies of the original contract, and bond hereinbefore mentioned and filed herewith as Exhibits "B" and "C," to this declaration. That said public building, as completed was turned over to the United States of America, by said Mankin Construction Company, and by the United States, acting through its duly constituted authorities accepted on or about July 12th, A. D. 1906, and that final settlement for same was made on or about that date; and that since the acceptance and final settlement of said building, a period of

more than six months has elapsed and no suit has been brought by the United States in its own behalf, or for the use of any other person or corporation touching upon or concerning said building.

Plaintiff alleges that said usee has fully conformed to all provisions set forth in those certain statutes of the United States hereinbefore mentioned, as prerequisite to the bringing of a suit thereon, and now brings this its suit in conformity with and in accordance with the requirements of same against said defendant in the sum of one thousand and forty-nine ($1049.78) dollars, with legal interest and all costs to be by it expended in the prosecution of this its action.

Plaintiff is informed and believes that The J. L. Mott Iron Works, of New York, N. Y., and N. O. Nelson Manufacturing Company, of St. Louis, Mo., are creditors interested in the prosecution of this action on account of materials furnished by them for the construction of the Federal Building hereinbefore mentioned.

Plaintiff therefore prays that such personal notice of the pendency of this suit, informing them of their right to intervene, be given as the Court may order to the creditors mentioned, and in addition thereto notice of publication in some designated newspaper of general circulation published in the state or town where the contract was performed be given for at least three successive weeks.

Plaintiff further prays for such other general and special relief in the premises considered as to this Honorable Court may seem just and right and in duty bound will ever pray.

SHIELDS & BOWMAN,
Sols. for Pltff.

5

State of Mississippi,
County of Adams.

Before me, Rich'd F. Reed, notary public, in and for said county and state, personally appeared the undersigned, G. B. Shields, one of the solicitors of record for the complainant in the foregoing petition and he being duly sworn on oath states that allegations and averments in said petition made as to the knowledge of complainant are true; that those made upon information and belief he believes to be true, and that all are true of the best of his information, knowledge and belief, and that the knowledge, information and belief upon which this affidavit is based is the knowledge, information and belief of affiant personally, as well of said complainant.

G. B. SHIELDS.

Sworn to and subscribed before me, this 15th day of February, 1907.

RICH'D F. REED,
Notary Public.

The above and foregoing has the following indorsement thereon, to-wit: 6498. U. S. for the Use of Ludowici-Celadon Co., vs. Mankin Construction Co. and Title Guaranty and Trust Co. Petition of Complainants. Filed February 21st, 1907. L. B. Moseley, Clerk. Shields & Bowman.

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## CONTRACT EXHIBIT "A."

### Contract Between the United States of America and The Mankin Construction Co.

Whereas, by advertisement duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

Whereas, the proposal of The Mankin Construction Co. furnished response thereto, was duly accepted at as hereinafter stated, on condition that they execute a contract in accordance with the terms of said bid.

Now, herefore, this agreement made and entered
6 into by and between L. M. Shaw, Sceretary of the Treasury, for and in behalf of the United States of America, of the first part and The Mankin Construcion Co., a partnership composed of Edwin T. Mankin and Henry M. Magie, of Richmond, Va., of the second part.

Witnesseth, That the party of the second part for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the construction, complete of the post-office at Natchez, Miss.,..... in strict and full accordance with the requirements with drawings numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, H. W. 16; H. W. 17, M-32, M-38, M-48, M-50; and such other detail drawings as may be furnished to the party of the second part by the supervising architect of the United States Treasury Department; the advertisement for proposals dated December 30, 1904; the specification for the work; the proposal dated February 9, 1905, addressed to the said supervising architect by the said party of the second

part; the letter dated February 25, 1905, addressed to the said party of the second part by H. A. Taylor, assistant secretary of the treasury, accepting said proposal; . . . . . a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said supervising architect and the signature of the said party of the second part, are on file in the office of the supervising architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and in such times and seasons, and with such force as from time to time be directed or prescribed by the supervising architect or his representative, and that the same shall be completed in all its parts by December 30, 1905; that all materials used shall be of the best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner; and that both the materials used and the work performed shall be in every respect to the entire and complete satisfaction of the supervising architect.

7 And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification.

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event of the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned and referred to, the said party of the first part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of twenty-five dollars for each and every day the said party of the second part shall be in default, which said sum of twenty-five dollars per day in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract

that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due to the said party of the second part, or to sue from and recover compensation or damages for the non-performance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the Uni[illegible] States, its officers, agents, servants and employees, harmless from and against all and every demand or demands, of any nature or kind for or on account of the use of any patented invention, article or appliance, included in the materials hereby agreed by to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will without expense to the United States, comply with all the municipal building ordinances and regulations in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to persons or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though, every item be not particularly shown on the first or mentioned in the second, shall be executed and performed, as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically provided; that all materials and work furnished shall be subject to the approval of the said supervising architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

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It is expressly covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to or changes in the work or materials herein provided for whenever required by said party of the first part; the valuations of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value on prevailing market rates; which market rates in case of disoute [dispute] are to be determined by the supervising architect, whose decision with reference thereto shall be binding upon both parties; and that no claim for damages on

account of such changes or for anticipated profits shall be made or allowed.

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part; and that no addition to, omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and in the absence of an express agreement or provision to the contrary, no addition to or omission from, changes in the work or materials specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

It is further covenanted and agreed by and between the parties hereto, that all materials furnished and work done under this contract shall be subject to the inspection of the supervising architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part with the right to reject any and all work or material not in accordance with this contract; and the decision of said supervising architect as to quality shall be final. And it is covenanted and agreed by and between the parties hereto
9 that said party of the second part will without expense to the United States, within a reasonable time to be specified by the supervising architect, remedy or remove any defective or unsatisfactory material or work; and that in the event or the failure of the party of the second part immediately to proceed and faithfully to continue so to do, said party of the second part may have the same done and charge the cost thereof to the account of the said party of the second part.

It is further covenanted and agreed by and between the parties hereto that until final inspection and acceptance of and payment for all of the material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work herein provided for shall be completed within such time as may be hereafter definitely specified by

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the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for; or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same; and is authorized and empowered after eight days' due notice thereof in writing, served personally upon or left at the shop, office or usual place of abode, or with the agent of the said party of the second part, and the said party of the second part having failed to take such action within the eight days as will in the judgment of the said party of the first part, remedy the default for which said notice was given to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and at the expense of said party of the second part to complete or have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the supervising architect, it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the said party of the second part shall without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather or otherwise; provided, that for all such suspensions and other delays caused by the said party of the first part, the party of the second part shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the contract, the same to be ascertained by the supervising architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise

out of any delay caused by the said party of the first part.

And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay or cause to be paid unto the said party of the second part, or to the heirs executors, administrators or successors, of the said party of the second part, in lawful money of the United States, in consideration of the herein recited covenants and agreements made by the party of the second part, the sum of thirty-four thousand, one hundred and sixty-four (34,164) dollars; such payment to be made as prescribed on page four of said specification and all the retained percentages of such price shall be..... forfeited by said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract; provided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached—on account of which payment is claimed—shall be found to be satisfactorily supplied and executed in every particular and any and all defects therein remedied to the entire satisfaction of the said party of the first part.

It is an express condition of this contract, that no
11 member of or delegate to congress or other person whose name is not at this time disclosed shall be admitted to any share in this contract or to any benefit to arise therefrom; and, it is further covenanted and agreed that this contract shall not be assigned.

In witness whereof, the parties hereto have hereunto subscribed their names, this 27th day of February, A. D. 1905.

The erasures in lines 22 and 24, page 2, and 1, 2, 3 and 4, page 5, and the interlineations in line 11, page 5, were made before the execution hereof.

L. M. SHAW, Secretary of the Treasury.

CEK JKT T

THE MANKIN CONSTRUCTION COMPANY.

(Place Corporate Seal Here). Contractor.

We hereby certify that this contract and bond has been correctly prepared and compared.

JAS. A. WETMORE,
Chief of the Law and
Records Division.
JAMES C. PLANT,
Chief of the Computing Division.

Witnesses to the signature of the Contractor:
(Two Witnesses)

B. S. BRUNT.
W. S. ELLIOTTE.

Note—Read rules carefully before executing.

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EXHIBIT "C" BOND.

Bond.

Know all men by these presents, That we, Edwin T. Mankin and Henry M. Magie, partners, doing business under the firm name of The Mankin Construction Co., of the City of Richmond, County of Henrico, and the State of Va., principals, and the Title Guaranty & Trust Co., of Scranton, Pa., of the City of Scranton, County of Lackawanna, and State of Pennsylvania, surety, are held and firmly bound unto the United States of America, in the sum of seventeen thousand dollars ($17,000), lawful money of the United States, for the payment of which well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of
12 March, A. D. 1905.

The condition of the above obligation is such, that, whereas the said Mankin Construction Co. have entered into a certain contract, hereto attached with L. M. Shaw, Secretary of the Treasury, acting for and in behalf of the United States, nearing [bearing] date the 27th day of February, A. D. 1905. now, if the said The Mankin Construction Co. shall, well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by them to be performed, and shall, well and truly comply with

and fulfill the conditions of and perform all the work and furnish all the labor and materials required by any and all changes in or additions to or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by them to be performed in any and all such changes in, or additions thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void, otherwise to remain in full force and virtue.

In testimony whereof the said Edward T. Mankin and Henry M. Magie, principals and The Title Guaranty & Trust Co., of Scranton, Pa., surety, have hereunto subscribed their hands and affixed their seals the day first above written.

[Seal] EDWARD T. MANKIN.
[Seal] HENRY M. MAGIE.
THE TITLE GUARANTY & TRUST
[Seal] CO., of Scranton, Penna.
[Seal] By GEO. T. PARKER,
[Seal] By PHILIP WALKER,
Attorneys in Fact.

Signed, sealed and delivered in presence of:

G. HEGNEMBOURG.
B. S. BRUNT.
W. S. ELLIOTTE.
NORMAN F. SHORT.
H. WADE PETIT.
M. R. BURR.
W. R. PARKER.

Note—Read rules carefully before executing.

The foregoing has the following indorsement thereon, to-wit: 6498. Ludowici-Celadon Co., vs. Mankin Construction Co., & Title Guaranty & Trust Co. No. 1798 A. Contract of the Mankin Construction Co., of Richmond, Va. For Construction for U. S. P. O., at Natchez, Miss., Dated Feb. 27, 1905. Amount $34.164. Exhibits "B" & "C." Filed February 25, 1907. L. B. Moseley, Clerk.

13 PETITION OF INTERVENTION OF THE J. L. MOTT IRON WORKS.

In the Circuit Court of the United States, Southern District of Mississippi.

To May Term, 1907.

United States for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff,

vs. No. 6498.

Edwin T. Mankin and Henry M. Margie, of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and the Title Guaranty & Trust Company of Scranton, Pennsylvania, a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

.....

The J. L. Mott Iron Works,
(Incorporated) as Interveners.

Petition in Intervention by The J. L. Mott Iron Works.

The petition of The J. L. Mott Iron Works respectfully shows to the Court, as follows:

(1)

Petitioner is a corporation duly incorporated, organized and doing business under the laws of the State of New York, domiciled and doing business in the City of New York, in said state, and in the conduct of said business engaged in the manufacture and sale of all kinds of plumbers material, fittings, furnishings and supplies, and all articles of manufacture and merchandise sold and used in the plumbing and hardware business, and was so engaged on and prior to the 6th day of December, 1905.

(2)

On March 1st, A. D. 1907, petitioner was duly served by the U. S. Marshal, in the City of New York, ..... with a legal notice issued under the seal of this Court, by Hon. L. B. Moseley, clerk of said Court, notifying petitioner of the

pendency in said Court of the above styled suit, in order that petitioner might file its claim and intervene and become a party thereto within the time prescribed and in form
14 and manner provided by law. And the original notice so served is hereto attached and herewith submitted to be filed as Exhibit "A" to this petition. And in pursuance of said notice and of the statute in this case made and provided, petitioner now presents this petition in intervention, and as a further basis and reason for so doing, submits the following additional facts.

(3)

That prior to the 24th day of July, A. D. 1905, the defendant, "Mankin Construction Company," had entered into a contract in writing with the United States of America, for the construction, erection and completion etc., of a post-office building in the City of Natchez, in the southern district of the State of Mississippi. That in pursuance of the statute, said Mankin Construction Company, as principal, with said defendant, The Title Guaranty & Trust Company, as surety, executed a bond in the sum of $17,000.00, conditioned according to law, and for the faithful performance of all covenants and conditions contained in the aforesaid contract, and among other things providing for the promptly making payment to all persons supplying them, the said Mankin Construction Company, with labor or materials in the prosecution of the work contemplated by said contract. And a duly certified copy of the original of said contract and of said bond are filed as Exhibits "A" and "B," respectively to the original petition of the Ludowici-Celadon Co., the plaintiff in the above styled suit, and are here specially referred to, and said copies of said contract and bond as well as said petition of original complainant are hereby made part of the allegations of this petition as much as if the same were herein copied and set forth at length.

(4)

That in the course and process of erection of said post-office building, the said Mankin Construction Co., (as alleged in the petition of complainant), entered into a contract with one, W. E. Smythe, a contractor and plumber in the City of Natchez, for the construction and erection of certain parts of said building.

DARK PA



(5)

That petitioner, The J. L. Mott Iron Works, in the due course of its business (conducted as alleged in Paragraph 1), during the period beginning on or about the 6th of December, 1905, and ending on or about the 14th of July, 1906, sold and delivered to the said W. E. Smythe, a sub-
15 contractor as aforesaid under the said principal contractor, Mankin Construction Company, various and sundry article of hardware, plumbers supplies, fittings, fixtures, goods, wares and merchandise, to the net amount and value of $620.65, and as more fully shown, enumerated and set forth in an itemized account thereof duly verified hereto attached and prayed to be filed herewith as Exhibit "B" to this petition, and hereby made part of the same as much so as if here fully set forth at length. That said articles and things, etc., were sold and delivered to said W. E. Smythe at his special instance and request, and the same were used by him, as subcontractor aforesaid in the construction, and in and upon, the said post-office building of the United States.

(6)

Petitioner further shows that neither the said W. E. Smythe, nor the said Mankin Construction Company nor the said The Title Guaranty & Trust Company, nor any other person, firm or corporation, has ever paid said petitioner, J. L. Mott Iron Works, nor any persons for them, for the whole or any part of the materials included and itemized in the aforesaid account for $620.65, and which were supplied by petitioner as aforesaid, and which were used as above stated in and upon the said U. S. Post-Office building although, each of said parties named as defendants as well as said Smythe have been often requested so to do.

(7)

Petitioner further shows that the original plaintiff, Ludowici-Celadon Company, has fully complied with all the provisions of that certain statute of the United States, entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." as approved August 13th, 1894, and as amended by Act of Congress, approved Feb. 24th, 1905; that the above styled suit has been duly instituted and is now pending in this Honorable Court; that

the above parties defendant are by virtue of proper process, now duly before the Court; that said U. S. Post-Office building was duly completed and turned over by the said Mankin Construction Company to the United States, and was by the latter received and accepted through its proper authorities on or about July 12, 1906, and final settlement for same had on or about that date; that more than six months elapsed between the date of said acceptance and settlement, and the date of the institution of this above styled suit, and
16 that no other suit has been brought or has since been brought by the United States in its own behalf or for the use or benefit of any other person touching upon or concerning said building.

(8)

That by virtue of the provisions of the aforesaid Acts of Congress and pursuant to the aforesaid notice issued out of this Court, and under the facts hereinbefore stated, petitioner may properly and legally intervene as a plaintiff in the above styled suit, and in fact it is under the statutes, necessary that petitioner should so intervene in order to preserve and protect its rights in the premises, inasmuch as said statute among other things expressly provides "That where suit is so instituted by a creditor [or] by creditors, only one suit shall be brought and any creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later," and further provides, "That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the Court may order, shall be given to all known creditors."

(9)

Petitioner further shows that the defendants, Edwin T. Mankin and Henry M. Margie, the individuals who composed the said Mankin Construction Company, defendants, are residents of the City of Richmond, State of Virginia, and have no agent or personal representative in the State of Mississippi upon whom personal service can be had within the jurisdiction of this Court. That the defendant, The Title Guaranty & Trust Company, is a non-resident corporation domiciled in Scranton, Pennsylvania, but that L. B. Moseley, of Jackson, Mississippi, is the duly authorized agent of the said, The Title Guaranty,

and Trust Company, in the State of Mississippi, for the purpose of service and acceptance of service personally of process issued by this Court,, as will further appear by reference to Exhibit "C" to the original petition of the Ludowici-Celadon Co., plaintiff, filed in this Court,

Wherefore, the premises considered, petitioner, The J. L. Mott Iron Works, prays the leave and permission of this Honorable Court to file this petition in intervention, and to intervene as a plaintiff in said original suit; that upon the filing of this petition in intervention the defendant, Edwin T. Mankin and Henry M. Margie (composing said firm of Mankin Construction Company) be cited by the proper pro-
17 cess of this Court, and the said, The Title Guaranty & Trust Company, defendant, be summoned by proper process (unless its said agent, L. B. Moseley, shall waive such service and accept such service as process) to defend said suit as to the J. L. Mott Iron Works, intervening plaintiff, and to show cause why the prayer of this petitioner should not be granted, and that at the final hearing judgment be rendered in favor of petitioner and against said defendants for the full amount of petitioner's claim, $620.65, together with legal interest accrued thereon, and all costs of this suit.

And petitioner will ever pray, etc.

THE J. L. MOTT IRON WORKS,
By REED & BRANDON,
Their Attorneys.

State of Mississipi,
County of Adams, ss.

Before me, the undersigned authority in and for said County and State, personally appeared Gerard Brandon, one of the attorneys of record for petitioner, The J. L. Mott Iron Works, who, being duly sworn, on oath states that the matters and things in the foregoing petition set forth as of affiant's knowledge are true, as stated; that those set forth on information and belief, he verily believes to be true, and that all are true, to the best of his knowledge, information and belief; and that said facts are within the knowledge, information and belief, respectively, as the case may be, of the J. L. Mott Iron Works, as well as of affiant.

GERARD BRANDON.

Sworn to and subscribed to before me this 6th day of April, A. D. 1907.

H. R. GAITHER, [Seal.]
Notary Public.

The above and foregoing has the following indorsement thereon, to-wit:

No. 6498. In the Circuit Court of the United States for the Southern District of Mississippi. Petition. J. L. Mott Iron Works as interveners, in suit of United States for the use, etc., Ludowici-Celadon Co. vs. Mankin Construction Co., ea al., defendants. Filed April 11th, 1907. L. B. Moseley, Clq. Reed & Brandon, Attys.

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## PETITION OF INTERVENTION OF N. O. NELSON MFG. CO.

In the Circuit Court of the United States, Southern District of Mississippi.

To May Term, 1907.

United States for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff,

vs. No. 6498.

Edwin T. Mankin and Henry M. Margie, of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty & Trust Company of Scranton, Pennsylvania, a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

N. O. Nelson Mfg. Co. of St. Louis, Mo. (Incorporated), As Interveners.

Petition in Intervention
by
N. O. Nelson Mfg. Co.

The petition of N. O. Nelson Mfg. Co. respectfully shows to the Court as follows:

(1)

Petitioner is a corporation, duly incorporated, organized and doing business under the laws of the State of Missouri, its domicile and principal place of business in the City of St. Louis, in said State, and in the conduct of such business is a

manufacturer, dealer and jobber in bath tubs, soil pipe, brass goods, lead pipe, plumbers marble, water closets, hydrants, pumps, and in plumbers, steam fitters and machinists' supplies of all kinds; and was so engaged on and prior to the 24th day of July, 1905.

(2)

On , A. D. 1907, petitioner was duly served by the U. S. Marshal, in the City of St. Louis, with a legal notice issued under the seal of this Court by Hon. L. B. Moseley, Clerk of said Court, notifying petitioner of the pendency in said Court of the above styled suit, in order that petitioner might file its claim and intervene and become
19 a party thereto within the time prescribed and in form and manner provided by law. And the original notice so served is hereto attached and herewith submited to be filed as Exhibit "A" to this petition. And in pursuance of said notice and of the statute of this case made and provided, petitioner now presents this petition in intervention, and as a further basis and reason for so doing, submits the following additional facts.

(3)

That prior to the 24th day of July, A. D. 1905, the defendant, "Mankin Construction Company," had entered into a contract in writing with the United States of America for the construction, erection and completion, etc., of a post office building in the City of Natchez, in the Southern District of the State of Mississippi; that in pursuance of the statute said Mankin Construction Company, as principal, with said defendant, The Title Guaranty & Trust Company, as surety, executed a bond in the sum of $17,000.00, conditioned according to law, and for the faithful performance of all covenants and conditions contained in the aforesaid contract, and among other things providing for the promptly making payment to all persons supplying them, the said Mankin Construction Company, with labor or materials in the prosecution of the work contemplated by said contract. And a duly certified copy of the original of said contract and of said bond are filed as Exhibits "A" and "B" respectively, to the original petition of the Ludowici-Celadon Co., the plaintiff in the above styled suit, and are here specially referred to and said copies of said contract and bond, as well as said petition of original complainant,

are hereby made part of the allegations of this petition, as much as if the same were herein copied and set forth at length.

(4)

That in the course and process of erection of said post office building the said Mankin Construction Co (as alleged in the petition of complainant) entered into a contract with one W. E. Smythe, a contractor and plumber in the City of Natchez, for the construction and erection of certain parts of said building.

(5)

That petitioner, the N. O. Nelson Mfg. Co., in the due course of its business (conducted, as alleged in paragraph 1,) during the period beginning on or about the 24th day of July, 1905, ending on or about the 20th day of January, 1906, sold and delivered to the said W. E. Smythe, a sub-contractor, as aforesaid, under the said principal contractor, Mankin Construction Company, various and sundry articles of hardware. plumbers' supplies, fittings, fixtures, goods, wares and merchandise, to the net amount and value of $1921.42 (goods amounting to $2540.12, less credits for goods returned, $618.70, leaving net amount $1921.42), and as more fully shown, enumerated and set forth in an itemized account thereof, duly verified, hereto attached and prayed to be filed herewith as Exhibit "B" to this petition, and hereby made part of the same, as much so as if here fully set forth at length. That said articles and things etc., were sold and delivered to said W. E. Smythe at his special instance and request, and the same were used by him, as sub-contractor, aforesaid, in the construction and in and upon the said post-office building of the United States.

(6.)

Petitioner further shows that neither the said W. E. Smythe, nor the said Mankin Construction Company, nor the said, The Title Guaranty & Trust Company nor any other person, firm or corporation, has ever paid said petitioner, N. O. Nelson Mfg. Co., nor any person for them, for the whole or any part of the materials included and itemized in the aforesaid account for $1921.42, and which were supplied by petitioner, as

aforesaid, and which were used, as above stated, in and upon the said U. S. post-office building, although each of said parties named as defendants, as well as said Smythe, have been often requested so to do.

(7)

Petitioner further shows that the original plaintiff, Ludowici-Celadon Company, has fully complied with all the provisions of that certain statute of the United States, entitled "An Act for the protection of persons furnishing materials and Labor for the Construction of Public Works," as approved August 13th, 1894, and as amended by Act of Congress, approved Feby. 24th, 1905; that the above styled suit has been duly instituted and is now pending in this Honorable Court; that the above parties defendant are, by virtue of proper process, now duly before the Court; that said U. S. post-office building was duly completed and turned over by the said Mankin Construction Company to the United States, and was by the latter received and accepted through its proper authorities on or about July 12, 1906, and final settlement for same had on or about that date; that more than six months elapsed between the date of said acceptance and settlement and the date of the institution of this above styled suit and that no other
21 suit has been brought or has since been brought by the United States in its own behalf or for the use or benefit of any other person touching upon or concerning said building.

(8)

That by virtue of the provisions of the aforesaid Acts of Congress and pursuant to the aforesaid notice issued out of this Court, and under the facts hereinbefore stated, petitioner may properly and legally intervene as a plaintiff in the above styled suit,—and, in fact, it is under the statutes, necessary that petitioner should so intervene in order to preserve and protect its rights in the premises, inasmuch as said statute, among other things, expressly provides, "That where suit is so instituted by a creditor by creditors, only one suit shall be brought, and any creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later," and further provides, "That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, in-

forming them of their right to intervene, as the Court may order, shall be given to all known creditors."

(9)

Petitioner further shows that the defendants, Edwin T. Mankin and Henry M. Margie, the individuals who composed the said Mankin Construction Company, defendants are residents of the City of Richmond, State of Virginia, and have no agent or personal representative in the State of Mississippi, upon whom personal service can be had within the jurisdiction of this Court. That the defendant, The Title Guaranty & Trust Company, is a non-resident corporation, domiciled in Scranton, Pennsylvania; but, that L. B. Moseley, of Jackson, Mississippi, is the duly authorized agent of the said The Title Guaranty & Trust Company, in the State of Mississippi, for the purpose of service and acceptance of service personally of process issued by this Court, as will further appear by reference to Exhibit "C" to the original petition of the Ludowici-Celadon Co., plaintiff, filed in this Court.

Wherefore the premises considered, petitioner, N. O. Nelson Mfg. Co., prays the leave and permission of this Honorable Court to file this petition in intervention, and to intervene as a plaintiff in said original suit; that upon the filing of this petition in intervention the defendant, Edwin T. Mankin and Henry M. Margie (composing said firm of Mankin Construction Company), be cited by the proper process
22 of this Court, and the said, The Title Guaranty & Trust Company defendant, be summoned by proper process (unless its said agent, L. B. Moseley, shall waive such service and accept such service as process) to defend said suit as to the N. O. Nelson Mfg. Co., intervening plaintiff, and to show cause why the prayer of this petitioner should not be granted, and that at the final hearing judgment be rendered in favor of petitioner and against said defendants for the full amount of petitioner's claim, $1921.42, together with legal interest accrued thereon and all costs of this suit.

And petitioner will ever pray, etc.

N. O. NELSON MFG. CO.,
By REED & BRANDON,
Their Attorneys.

State of Mississippi,
County of Adams, ss.

Before me the undersigned authority, in and for said County and State, personally appeared Gerard Brandon, one of the at-

torneys of record for petitioner, N. O. Nelson Mfg. Co., who, being duly sworn, on oath states that the matters and things in the foregoing petition set forth as of affiant's knowledge, are true as stated; that those set forth on information and belief he verily believes to be true, and that all are true to the best of his knowledge, information and belief, and that said facts are within the knowledge, information and belief, respectively, as the case may be of the N. O. Nelson Mfg. Co., as well as of affiant.

GERARD BRANDON.

Sworn to and subscribed to before me this 6th day of April, A. D. 1907.

H. R. GAITHER, [Seal.]
Notary Public.

The above and foregoing has the following indorsemnt thereon to-wit:

No. 6498. In the Circuit Court of the United States for the Southern District of Mississippi. Petition. The N. O. Nelson Mfg. Co., as interveners in the suit of United States for use of Ludowici-Celadon Co., plaintiff, vs. Mankin Construction Co., defendants. Filed April 11/1907. L. B. Moseley Clerk. Reed & Brandon, Attys.

23 ORDER GIVING TO THE J. L. MOTT IRON WORKS LEAVE TO INTERVENE.

To May Term, A. D. 1907.

In the Circuit Court of the United States, Southern District of Mississippi.

United States, for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff,

vs. No. 6498.

Edwin T. Mankin and Henry M. Margie of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty & Trust Company, of Scranton, Pa., a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

The J. L. Mott Iron Works (Incorporated), as Intervener.

Order Giving to the J. L. Mott Iron Works Leave to Intervene.

This cause coming on for hearing upon the reading and filing of the petition of the J. L. Mott Iron Works for leave and permission to intervene as a plaintiff in said suit, and in said proceeding, to prosecute its claim against defendants.

And it appearing that the J. L. Mott Iron Works is one of the parties suggested in the original petition by the plaintiff as having the right under the statute, pursuant to which said suit is brought, to intervene, and that said petition is presented pursuant to notice duly issued out of this Court, informing petitioner of its right to intervene, and that the facts alleged in the petition (if sustained by proof) are such as to entitle petitioner to intervene:

It is thereupon ordered that the said, the J. L. Mott Iron Works be and is hereby granted leave and permission of this Court to file their petition in intervention and to intervene as a plaintiff in said original suit, and to prosecute their claim in said proceedings against the defendants to its legal conclusion; and that Edwin T. Mankin and Henry M. Margie (composing the firm of Mankin Construction Company) be cited by proper process of this Court, and that The Title Garanty and Trust Company, defendant, be summoned by proper process (unless it shall waive such summons and en-

24 ter appearance herein) to appear before this Court at the May term, 1907, to answer said petition and

to defend said suit, as to the J. L. Mott Iron Works, intervening plaintiff, and then and there to do and suffer such other and further things as the Court may order.

Ordered this the 11th day of April, A. D. 1907.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit:

No. 6498. In the Circuit Court of U. S. for Southern District of Miss. In re. Petition of the J. L. Mott Iron Works, interveners, in suit of U. S. for the use etc., of The Ludowici-Celadon Co., Pltff., vs. Mankin Construction Co., et al., Defts. Order permitting petitioner to intervene as a plaintiff, etc. Filed April 11, 1907. L. B. Moseley, Clk. E. M. B. 9 pages. Reed & Brandon, Attys.

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25 ORDER GIVING TO THE N. O. NELSON MFG. CO. LEAVE TO INTERVENE.

In the Circuit Court of the United States, Southern District of Mississippi.

To May Term, A. D. 1907.

United States, for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff,

vs. No.. 6498.

Edwin T. Mankin and Henry M. Margie, of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty & Trust Company of Scranton, Pennsylvania, a Corporation, Duly Incorporated Under the Laws of Pennsylvania, Defendants.

The N. O. Nelson Mfg. Co (Incorporated), as Intervener.

Order Giving to the N. O. Nelson Mfg. Co. Leave to Intervene.

This cause coming on for hearing upon the reading and filing of the petition of the N. O. Nelson Mfg. Co., for leave and permission to intervene as a plaintiff in said suit, and in said proceeding, to prosecute its claim against defendants.

And it appearing that the N. O. Nelson Mfg. Co. is one of the parties suggested in the original petition by the plaintiff as having the right under the statute, pursuant to which said suit is brought, to intervene, and that said petition is presented pursuant to notice duly issued out of this Court, informing petitioner of its right to intervene, and that the facts alleged in the petition (if sustained by proof) are such as to entitle petitioner to intervene:

It is thereupon ordered that the said the N. O. Nelson Mfg. Co. be and is hereby granted leave and permission of this Court to file their petition in intervention and to intervene as a plaintiff in said original suit, and to prosecute their claim in said proceedings against the defendants to its legal conclusion; and that Edwin T. Mankin and Henry M. Margie (composing the firm of Mankin Construction Company) be cited by proper process of this Court, and that The Title Guaranty and Trust Company defendant, be summoned by proper process (un-
26 less it shall waive such summons and enter appearance herein), to appear before this Court at the May term, 1907, to answer said petition and to defend said suit as to the N. O. Nelson Mfg. Co., intervening plaintiff, and then and there to do and suffer such other and further things as the Court may order.

Ordered this the 11th day of April, A. D. 1907.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit:

No. 6498. In the Circuit Court of U. S. for Southern District of Miss. In re. Petition of The N. O. Nelson Mfg. Co., interveners in suit of U. S. for the use, etc., of The Ludowici-Celadon Co., Pltff., vs. Mankin Construction Co., et al., Defts. Order permitting petitioner to intervene as a plaintiff, etc. Filed April 11th, 1907. L. B. Moseley, Clk. E. M. B. 9 pages, 328 & 329. Reed & Brandon, Attys.

27 PLEA OF DEFENDANTS.

In the Circuit Court of the United States for the Southern District of Mississippi.

United States for the Use and Benefit of Ludowici-Celadin Company, Plaintiff,

vs.

Edwin T. Mankin and Henry M. Magie, of Richmond, Virginia, Co-Partners, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty & Trust Company, of Scranton, Pennsylvania, a Corporation duly Incorporated Under the Laws of Pennsylvania. Defendants.

Now comes the defendants herein, by their attorneys, and for plea in this behalf say that they did not undertake and promise, and are not indebted in manner and form, as the plaintiff hath alleged against them, and for this they put themselves upon the country.

CATCHINGS & CATCHINGS,
Attorneys for Defendants.

The above and foregoing has the following indorsement thereon, to-wit:

6498. U. S. Use of Ludowici-Celadon Co. vs. Plea. Mankin Construction Co. & Title Guaranty & Surety Co. Filed May 3, 1907. L. B. Moseley, Clk. Catchings & Catchings.

28 AGREED STATEMENTS OF FACTS AND AGREEMENT BY AND BETWEEN ALL PARTIES BY THEIR ATTORNEYS, INCLUDING COPY OF CONTRACT BETWEEN W. E. SMYTHE AND THE MANKIN CONSTRUCTION COMPANY.

In the Circuit Court of the United States, Southern District of Mississippi.

United States, for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff

vs.

Edwin T. Mankin and Henry M. Margie, of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty and Trust Company of Scranton, Pennsylvania, a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

N. O. Nelson Mfg. Co. of St. Louis, Mo. (Incorporated), and J. L. Mott Iron Works (Incorporated), of New York, Interveners.

Agreed Statement of Facts and Agreement by and Between Said Parties, Plaintiff and Defendant, and Said Interveners, by their respective Attorneys of Record Undersigned.

Agreed statement of facts and agreement between parties as to submission, etc., hereinafter printed at page 33.

* * * * * * * * * 6

Additional agreed statement of facts, hereinafter printed at page 35.

* * * * * * * * * *

Contract between W. E. Smythe and Mankin Construction Co., hereinafter printed at page 36.

* * * * * * * * * 6

35 The above and foregoing has the following indorsement thereon, to-wit:

6498. Ludowici-Celadon Co. vs. Mankin Construction Co., et al. Agreement on Statement of Facts between Attys. Filed Oct. 18, 1907. L. B. Moseley, Clerk.

36 JUDGMENT.

United States for Use and Benefit of Ludowici-Celadon Company,
vs. 6498.
Mankin Construction Company et al.

Came the parties by their attorneys, and came also a jury of good and lawful men, to-wit: James Ewing and eleven others, who were elected, empanneled and sworn to well and truly try the issue joined and true verdict render, according to the law and the evidence; and having heard the evidence and the argument of counsel, and having received the instructions of the Court, they retired to consider of their verdict, and afterwards returned into open Court the following verdict:

"We, the jury, find for the plaintiff, for the use of the Ludowici-Celadon Company, a corporation, the sum of $1217.78; for the plaintiff, for the use of the J. L. Mott Iron Works, a corporation, in the sum of $709.97, and for the plaintiff for the use of The N. O. Nelson Manufacturing Company, corporation, in the sum of $2,129.47."

It is, therefore, considered that the United States of America, for the use of the Ludowici-Celadon Company, a corporation, do have and recover of and from the defendants, Edwin T. Mankin and Henry M. Magie doing business under the firm name of Mankin Construction Company, and The Title Guaranty & Trust Company, a corporation, the sum of $1217.78; that the United States of America, for the use of The J. L. Mott Iron Works, a corporation, do have and recover of and from the said Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, and The Title Guaranty & Trust Company, a corporation, the sum of $709.97; and that the said United States of America, for the use of the N. O. Nelson Manufacturing Company, a corporation, do have and recover of and from the said Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, and The Title Guaranty & Trust Company, a corporation, the sum of $2,129.47; and that the said defendants pay all the costs of this suit to be taxed; for which let execution issue.

H. C. NILES, Judge.

Filed Nov. 12, 1907.

E. M. B. 9, pp. 570 & 571.

37 MOTION FOR A NEW TRIAL.

United States for the Use and Benefit of Ludowici-Celadon Company,
vs.
Mankin Construction Company, et al.

Came the defendants by their attorneys, and move the Court to set aside the verdict herein rendered and grant a new trial, and for cause show:

1st. The Court erred in granting instruction asked by the plaintiffs.

2nd. The Court erred in refusing the instructions asked by defendants.

3rd. The verdict is contrary to law.

4th. The verdict is contrary to the evidence.

CATCHINGS & CATCHINGS,
Attorneys for Defendants.

The above and foregoing has the following indorsement thereon, to-wit:

6498. U. S. for use of Ludowici-Celadon Co., vs. Mankin Constr. Co., et al. Motion for new trial. Filed Nov. 12th, 1907. L. B. Moseley, Clerk.

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United States, for Use and Benefit of Ludowici-Celadon Company,
vs. 6498.
Mankin Construction Company, et al.

This day came on to be heard defendant's motion to set aside the verdict herein rendered and award a new trial; and the Court having considered the same, it is ordered that the said motion be and it is hereby overruled, to which action of the Court the defendants then and there excepted.

Nov. 12th, 1907.

H. C. NILES, Judge.

38 In the Circuit Court of the United States, Southern District of Mississippi.

United States for the Use and Benefit of Ludowici-Celadon Company, et al.

On motion of defendants it is ordered that they be and they are hereby given 30 days from this date in which to prepare and file a bill of exceptions in the above entitled cause.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit:

U. S. for use of Ludowici-Celadon Co., vs. Mankin Construction Co. et al. Order allowing 30 days to prepare and file bill of Ex. Filed Nov. 12/07. L. B. Moseley, Clerk. E. M. B. 9, p. 571.

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## BILL OF EXCEPTIONS.

In the Circuit Court of the United States for the Southern District of Mississippi.

United States, for the Use and Benefit of The Ludowici-Celason Company, et al.

vs. Number 6398.

Mankin Construction Company et al.

Be it remembered, that at a regular term of the Circuit Court of the United States for the Fifth Circuit thereof, in and for the Southern District of Mississippi, begun and holden at the City of Jackson, Mississippi, on the first Monday of November, 1907, the Honorable Henry C. Niles, United States District Judge for the Northern and Southern Districts of the State of Mississippi, presiding, the following proceedings were had in the above entitled cause, which said cause came on for trial at said term, before a jury, duly and lawfully empanneled, to-wit: To maintain the issue joined the plaintiff introduced the following testimony, to-wit:

39 AGREED STATEMENT OF FACTS.

In the Circuit Court of the United States, Southern District of Mississippi.

United States, for the Use and Benefit of the Ludowici-Celadon Company, Plaintiff,

vs.

Edwin T. Mankin and Henry M. Margie, of Richmond, Virginia, Doing Business Under the Firm Name of Mankin Construction Company, and The Title Guaranty & Trust Company, of Scranton, Pennsylvania, a Corporation Duly Incorporated Under the Laws of Pennsylvania, Defendants.

N. O. Nelson Mfg. Co. of St. Louis Mo. (Incorporated), and J. L. Mott Iron Works (Incorporated), of New York, Interveners.

Agreed Statement of Facts and Agreement by and Between Said Parties, Plaintiff and Defendant, and Said Interveners, by their Respective Attorneys of Record Undersigned.

Agreed Statement of Facts.

The said defendants composing the Mankin Construction Company, prior to the first day of July, 1905, had entered into a contract in writing with the United States of America for the construction, erection and completion, etc., of the Post Office Building in the City of Natchez, of the Southern District of Mississippi; that in pursuance of the statute, said Mankin Construction Company, as principal, with the said Title Guaranty & Trust Company as surety, executed a bond in the sum of $17,000.00, conditioned according to law.

That the duly certified copies of the originals of said contract and said bond, which are filed as exhibits to the original petition in said suit, and which were furnished and certified to by the Treasury Department of the United States are true and correct copies of the originals now on file in said Treasury Department.

That W. E. Smythe, of Natchez, Mississippi, was a sub-contractor under said Mankin Construction Co., for the construction and erection of certain parts of said Post-Office Building.

That the document hereto attached, purporting to be a copy of the contract between said Mankin Construction Company and W. E. Smythe for certain heating, plumbing, roofing and sheet metal work, on said Post-Office Building is true and correct copy of the original contract and as such is to be admitted in evidence.

The said Post-Office Building was duly completed, and on or about July 12th, 1906, was accepted by the United States government, and payment thereof made to said Mankin Construction Company in accordance with contract.

That the said plaintiff, Ludowici-Celadon Company, and the said intervener, N. O. Nelson Mfg. Company and the said intervener, J. L. Mott Iron Works, respectively, sold and delivered to said W. E. Smythe, sub-contractor under said Mankin Construction Co., certain goods, wares and merchandise and materials, as fully shown and set forth in the itemized sworn accounts of said parties, respectively, duly filed and exhibited with their respective petitions in the above styled cause, which goods, wares, merchandise and materials were purchased and used by the said Smythe, as sub-contractor as aforesaid, in the construction of and in and upon the said Post-Office Building of the United States, and are now in and upon and form part and parcel of said Post-Office Building.

That at the date of the filing of their petition and accounts aforesaid in said cause, the said W. E. Smythe had not paid said Ludowici-Celadon Company or said N. O. Nelson Mfg. Company, or said J. L. Mott Iron Works for said goods, wares and merchandise and materials by them furnished, and by him used as aforesaid, but was then and still is indebted to them respectively for the same, and in the amounts shown and set forth in their respective itemized accounts exhibited and filed as above set forth, excepting that said Ludowici-Celadon Company has since received $11.54 from the trustee of W. E. Smythe, in bankruptcy, as a credit upon said claim.

Agreement.

It is mutually agreed by and between said parties, plaintiff, defendant and interveners, that the above styled cause may be submitted and tried upon the pleadings heretofore filed in said cause together with the exhibits to said pleadings, and upon the foregoing agreed statement of facts; it being further expressly understood and agreed, however, that at the hearing any or either of said parties may supplement the above agreed statement of facts by introducing at the trial competent testi-

mony to substantiate other relevant facts, but provided that no testimony shall be offered or introduced by any party contradictory of or contrary to any fact above stated and
41 agreed upon.

(Signed:) W. C. BOWMAN,
Atty. for Ludowici-Celadon Co.
REED & BRANDON,
Attys. for N. O. Nelson Mfg. Co. & J. L. Mott Iron Works.
CATCHINGS & CATCHINGS,
Attys. for Defendants.

United States for the Use, Etc., of Ludowici-Celadon Co., Plaintiffs,
vs.
Martin Construction Company and Title Guaranty & Trust Co., Defendants,
With
N. O. Nelson Manfg. Co. and J. L. Mott Iron Works, Interveners.

Additional Agreed Statement of Facts.

It is further agreed by and between the parties plaintiff, defendant, and intervening by their respective attorneys of record undersigned, that the following are facts, to-wit:

That the Mankin Construction Company had paid to W. E. Smythe the full amount due him by them on account of their contract, except the sum of $644.57, prior to receiving any notice from either the plaintiff or the interveners of their respective claims.

That the Ludowici-Celadon Company were to give W. E. Smythe credit for freight charges paid by him, and if it appears from their itemized account on file that proper credit has not been given for the same, that the amount thereof shall be deducted therefrom by complainant.

W. C. BOWMAN,
For Plaintiff.
CATCHINGS & CATCHINGS,
For Defents.
REED & BRANDON,
For Interveners.

## Copy of Agreement Between W. E. Smythe and Mankin Construction Co.

### Date. Partie.

This agreement made this 29th day of April, 1905, between W. F. Smythe of Natchez, Mississippi, (hereinafter designated sub-contractor), party of the first part, and the Mankin Construction Company, of the City of Richmond, Va. (hereinafter designated general contractor), party of the second part:

Witnesseth, that the said parties, for and in consideration of the money to be paid by said general contractor to said sub-contractor, and of the materials to be furnished
42 and the work to be done by said sub-contractor for said general contractor, do hereby mutually covenant and agree as follows:

### Article I.

### Work.

Said sub-contractor shall furnish all necessary materials of a satisfactory character for and shall perform in a good, substantial and workmanlike manner, within the time hereinafter specified, the following work: All of the plumbing (not including marble), gas fitting, heating, sheet metal work, tile roofing and felt, fittings for flag pole for the U. S. post-office to be built in Natchez, Miss.

Said materials and work are to be in strict accordance with the plans and specifications and revised sheet regarding fixtures, etc., made by supervising architect U. S. Treas'y Dept., which are identified by the signatures of said general contractor and the owner of said building, and which are hereby made part of this agreement; and all of said work and materials used are to be subject to the supervision of the architect.

### Article II.

### Time Limit.—Delay.

Said sub-contractor shall commence to perform said work within three days after receiving written notice from said general contractor; and he shall complete the whole of said work and every part thereof within by Dec. 1, 1905,..... days after the date of said written notice.

Damages.

And if said sub-contractor fails to complete said work within the time specified above, then he shall pay to said general contractor, as liquidated damages, the sum of $10.00 per day for each day's delay beyond the time specified; it being expressly understood and agreed between the parties that time is of the essence of this contract.

III.

Payments.

If the said sub-contractor faithfully performs all that is required of him under this contract, said general contractor shall pay to him the sum of forty-six hundred and ten dollars ($4610.00) in the following manner, to-wit:

(a) When rough plumbing and gas fitting is satisfactorily in place and tested to satisfaction of architect, 90 per cent of value of material and labor.

43 (b) When boiler is set and radiators and piping installed and connected and tested to satisfaction of architect, 90 per cent of value of material and labor.

(c) When tile roof is completed to satisfaction of architect, 90 per cent of value of material and labor.

(d) When sheet metal work, ventilating system,, etc. is completed to satisfaction of architect, 90 per cent of value of materials and labor, and the remaining 10 per cent due on all of the above work, work to be paid thirty days after final acceptance of work under this contract by the supervising architect.

Provided, that before each of said payments is made, said general contractor may require said sub-contractor to obtain a certificate from said architect, or the superintendent in charge of the work, showing the amount of work done by said sub-contractor and stating that the same is satisfactory to said architect or superintendent; and, provided further, that said general contractor may deduct from any of said payments such sum as may then be due him by said sub-contractor for delay in the performance of this contract.

## Article IV.

### Extension of Time.

If the said sub-contractor be delayed in the completion of said work by the act or default of said general contractor, or any of the other sub-contractors, or by strikes or lock-outs, caused by the employees of either party, then the time hereinbefore fixed for the completion of said work shall be extended for a period equal to the time lost by reason of any or more of the above mentioned causes; and if said parties cannot agree on the amount of such additional time then the same shall be determined by arbitration, as provided in Article XII of this contract. But no such allowance shall be made unless a written claim thereof is presented by said sub-contractor to said general contractor within two days after said delay commenced; and no lock-out shall be made by said sub-contractor without the written consent of said general contractor.

## Article V.

### Scaffolding, Etc.

Said sub-contractor shall provide, at his own proper costs and charges, all labor, materials, scaffolding, implements, models, moulds and cartage of every description necessary for the proper performance of said work.

## Article VI.

### Plans and Specifications.

Said plans and specifications shall co-operate and supplement each other, so that any work set forth in one and not in the other shall be performed, as if set forth in both, without any extra charge. And should any dispute arise as to the correct constructions of said plans and specifications, the same shall be decided by the architect, whose decision shall be final.

## Article VII.

### Changes.

No changes or alterations in or additions to, or omissions

from said work shall be made except upon the written order of the general contractor. The amount to be paid by said contractor contractor, or allowed by said sub-contractor, shall be stated in said written order if said parties can agree thereon; otherwise said sub-contractor, said proceed to carry out said written order, and the amount to be paid or allowed respectively, shall be determined by arbitration, as provided in Article XII of this contract.

## Article VIII.

### Right of General Contractor to Complete Work.

Should said sub-contractor, at any time during the progress of the work, neglect or refuse to supply all of the materials and workmen necessary for the proper prosecution thereof, then said general contractor shall have the right. after two days' written notice to said contractor, to provide the necessary materials and workmen, and to finish said work at the expense of said sub-contractor the cost thereof to be deducted from the amount due him under this contract, if any; otherwise to be a valid claim against him.

## Article IX.

### Release of General Contractor.

Should general contractor become liable to any other person for materials furnished to, or work done for, said sub-contractor, on account of the materials and work required by this contract, then said general contractor reserves the right to rejuire a full release from all such claims, and to withhold any amount which may then be due to said sub-contractor until such release is furnished.

## Article X.

### Insurance.

Said sub-contractor shall pay to said general contractor his pro rata share for all premiums for the protection of his interest in said building from fire; and in the event of loss by fire, said sub-contractor shall have such portions of the policies of insurance on which he has paid his share of said premiums, as his interest may appear. Should the said parties be unable

to agree upon the share of said premiums to be paid by and the share of said policies to be paid to said sub-contractor, then the same shall be determined by arbitration, as provided in Article XII of this contract.

## Article XI.

### Non-Liability of General Contractor for Damages.

Said general contractor shall not be responsible in any manner, or to any extent, for any loss or damage that may happen to said work, or to pay any part thereof, or for any materials used therein, or work done thereon, except as hereinbefore provided. Nor shall the said general contractor be responsible for any damages caused by said sub-contractor, or by any of his employees, or for any injury or death resulting to his said employees, or to any other party, in the discharge of his said work, and said sub-contractor shall save said general contractor harmless from all such loss or damage. In the event said general contractor incurs any expense in defending any suit brought against him on account of such personal injuries or death, or in event of his having to pay any damage therefor, then said sub-contractor shall indemnify and reimburse him therefor; and said general contractor may withhold all or any part of any money due by him to said sub-contractor under this contract for his indemnity and protection, until his claim for reimbursement is adjusted; and said general contractor is reimbursed or released from such liability. But if said money is paid to said sub-contractor before the adjustment of said general contractor's claim against him, then said sub-contractor shall execute and deliver to said general contractor a good and sufficient indemnifying bond, in a sufficient sum, to protect said general contractor, with a satisfactory bonding company doing business in the State of Virginia, as
46 surety.

## Article XII.

### Arbitration.

Should said general contractor and sub-contractor be unable to agree as to the matter mentioned and described in Articles IV, VII and X of this contract, then such matters shall be referred to a board of arbitration, consisting of three disinterested persons, one to be selected by said general contrac-

tor, one by said sub-contractor, and these two arbitrators to select a third. The decision of any two members of this board shall be final and binding on both of the parties hereto. Each party hereto shall pay one-half of the expense of such arbitration.

Article XIII.

Bond.

Before this contract shall be binding on said general contractor, said sub-contractor shall enter into bond in the penalty of $1500.00, with a satisfactory bonding company, doing business in the State of Virginia, as surety, conditioned on the faithful perforance of all provisions of this contract by said sub-contractor.

Article XIV.

Performance of Covenants.

The said parties, for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants and provisions herein contained.

Witness the following signatures and seals.

Witness:

..... [Seal.]

47 This was all the testimony in the case, plaintiff and defendants both resting.

At the close of the testimony the plaintiff tendered to the Court the following instruction, and requested the Court to give the same:

"The Court instructs the jury to find for the complainants."

The defendant, in the presence of the jury, objected to the giving of the said instruction, which objection was by the Court overruled, and the said instruction given as requested, whereupon the defendant, in the presence of the jury, and before they had retired, excepted to said action of the Court in giving the said instruction. Thereupon the defendant, in the presence of the jury, tendered to the Court the following instructions, and requested the Court to give the same:

"1. The Court instructs the jury to find for the defendants.

2. The Court instructs the jury that the defendants are not liable beyond the sum owing by the Mankin Construction Company to W. E. Smythe at the time it received notice of the claims of petitioners and the interveners against the said Smythe, viz: $644.57."

The Court refused to give the said instructions, whereupon the defendants then and there, in the presence of the jury, and before they had retired, excepted to said action of the Court in refusing said instructions and each of them. No other instructions were given and the Court did not charge orally.

The jury then retired to consider of their verdict, and afterwards returned into open Court the following verdict:

"We, the jury, find for the plaintiff for the use of the Ludowici-Celadon Company, a corporation, in the sum of $1,217.78; for the plaintiff for the use of the J. L. Mott Iron Works, a corporation, in the sum of $709.97; and for the plaintiff for the use of the N. O. Nelson Manufacturing Company, a corporation, in the sum of $2129.47."

Thereupon defendant made the following motion for a new trial:

"Come the defendants, by their attorneys, and move the

Court to set aside the verdict herein rendered and grant a new trial, and for cause show:

First. The Court erred in granting the instruction asked by the plaintiff.

Second. The Court erred in refusing the instructions asked by the defendants.

Third. The verdict is contrary to law.

48 Fourth. The verdict is contrary to the evidence."

The said motion was by the Court overruled, to which action of the Court in overruling and denying said motion, the defendants then and there excepted and tender this bill of exceptions, which is signed and sealed by the Honorable H. C. Niles, Judge of said Court, and made a part of the record of this case, this the 6th day of December, 1907.

H. C. NILES, Judge.

Examined and found correct.

W. C. BOWMAN,
Atty. for Plaintiff.
REED & BRANDON,
Attys. for Interveners.

The above and foregoing has the following indorsemnts thereon, to-wit:

6498. United States for the use of Ludowici-Celadon Co., et al., vs. Mankin Const. Co., et al. Bill of exceptions. Filed Dec. 9th, 1907. L. B. Moseley, Clk.

## PETITION FOR WRIT OF ERROR.

In Circuit Court of the United States for the Southern District of Mississippi.

United States, for the Use and Benefit of Ludowici-Celadon Company, et al.,
vs. Number 6498.
Mankin Construction Company.

Edwin T. Mankin and Henry M. Magie, a co-partnership, doing business under the firm name of Mankin Construction Company, and the Title Guaranty & Trust Company of Scranton, Pennsylvania, a corporation, defendants in the above entitled suit, feeling themselves aggrieved by the verdict of the jury and the judgment entered on the 12th day of November, 1907, come now by Catchings & Catchings, their attorneys, and petition said Court for an order allowing said defendants to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, under and according to the laws of the United States in that behalf made and provided; and also that an order may be made fixing the amount of security which the defendant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this Court may be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals in the said Circuit.

49 And for such other and further relief as petitioners may be entitled to.

EDWIN T. MANKIN,
HENRY M. MAGIE,
TITLE GUARANTY & TRUST CO.,
By CATCHINGS & CATCHINGS,
Attorneys for Defendants.

The above and foregoing has the following indorsement thereon to-wit:

6498. U. S. of America, for use of Ludowici-Celadon Co., et al., vs. Mankin Cons. Co., et al. Petition for writ of error. Filed Dec. 9th, 1907. L. B. Moseley, Clerk.

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*Order Allowing Writ of Error and Fixing Amount of Appeal Bond.*

In the Circuit Court of the United States for the Southern District of Mississippi.

Number 6469.

UNITED STATES for the Use and Benefit of LUDOWICI-CELADON COMPANY

*vs.*

MANKIN CONSTRUCTION COMPANY.

Order Allowing Writ of Error and Fixing Amount of Appeal Bond.

This day came on to be heard the petition of defendants, by their attorneys, for the allowance of a writ of error intended to be urged by them to the judgment rendered against them in the above entitled cause, on the 12th day of November, 1907, for an order fixing the amount of security which the said defendants shall give and furnish upon the said writ of error, and praying that upon the giving of such security all further proceedings in this Court may be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals in the said Circuit; and for such other and further relief as the petitioners may be entitled to.

On consideration whereof the Court does allow the writ of error upon the defendants, Edwin T. Mankin and Henry M. Magie, copartners, doing business under the firm name of the Mankin Construction Company, and the Title Guaranty & Trust Company of Scranton, Pennsylvania, a corporation, giving bond in the sum of $5,000.00, conditioned according to law, the same to be approved by the Judge of this Court, which shall operate as a supersedeas bond.

So ordered this 11th day of December, 1907.

H. C. NILES, *Judge.*

The above and foregoing has the following indorsement thereon, to-wit:

6498. U. S. of America, for the use of Ludowici-Celadon Co., *vs.* Mankin Cons. Co., *et al.* Order allowing writ of error fixing amount of appeal bond. Filed Dec. 14, 1907. L. B. Moseley, Clerk. E M B 9 page- 617-18.

*Writ of Error.*

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Southern District of Mississippi, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you or some of you, between Edwin T. Mankin and Henry M. Magie, copartners doing business under the firm name of Mankin Construction Company, and the Title Guaranty & Trust Company, of Scranton, Pennsylvania, a corporation, plaintiff in error, and the United States for the Use and Benefit of the Ludowici Celadon Company, the N. O. Nelson Manufacturing Company, and the J. L. Mott Iron Works, defendants in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth *District*, together with this writ, so that you may have the same at the City of New Orleans, Louisiana, on the 13th day of January, 1908, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of December, in the year of our Lord, One Thousand Nine Hundred and Seven.

L. B. MOSELEY,
*Clerk of the United States Circuit Court*
*for the Southern District of Mississippi.*

The above and foregoing has the following indorsement thereon, to-wit:

U. S. of America for use of Ludowici-Celadon Co. *et al. vs.* Mankin Cons. Co., *et al.* Writ of Error. Filed Dec. 27th, 1907. L. B. Moseley, Clerk.

*Citation.*

The United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *Fifth Judicial Circuit:*

To the United States of America for the Use and Benefit of the Ludowici-Celadon Company, the N. O. Nelson Manufacturing Company, and the J. L. Mott Iron Works:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of New Orleans in said Circuit, on the 13th day of January, 1908 next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, wherein Edwin T. Mankin and Henry M. Magie, co-partners doing business under the firm name of Mankin Construction Company, and the Title Guaranty & Trust Company of Scranton, Pennsylvania, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 14th day of Dec. 1907.

H. C. NILES, *Judge.*

Attest:

L. B. MOSELEY,
*Clerk of the Circuit Court of the United States*
*for the Southern District of Mississippi.*

We, the undersigned attorneys for the defendant in error in the above entitled cause, hereby accept service of this citation, and waive personal service thereof on said defendant in error.

W. C. BOWMAN AND
REED & BRANDON,
*Attorneys for Defendants in Error.*

The above and foregoing has the following indorsement thereon, to-wit:—

6498. U. S. of America for use of Ludowici-Celadon Co. *vs.* Mankin Cons. Co., *et al.* Citation. Filed Dec. 14th, 1907. L. B. Moseley, Clerk.

*Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of Mississippi.

UNITED STATES for the Use and Benefit of the LUDOWICI-CELADON COMPANY ET AL.

*vs.*

MANKIN CONSTRUCTION COMPANY ET AL.

Assignment of Errors.

Now come the defendants, by their attorneys, and say that the judgment in said cause is erroneous and against the just rights of the said defendant, for the following reasons:

First. Because the Court erred in granting the following instruction at the request of the plaintiff:

"The Court instructs the jury to find for complainants."

Second. Because the Court erred in refusing to grant the following instruction at the request of the de-endants:

"The Court instructs the jury to find for the defendants."

Third. Because the Court erred in refusing to grant the following instruction requested by the defendants:

"The Court instructs the jury that the defendants are not liable beyond the sum owing by the Mankin Construction Company to W. E. Smythe at the time it received notice of the claims of petitioner and interveners against the said Smith, viz: $644.57."

Fourth. The Court erred in overruling and denying the motion of defendants for a new trial.

Wherefore the defendants pray that such judgment be reversed.

CATCHINGS & CATCHINGS,
*Attorneys for Defendants.*

The above and foregoing has the following indorsement thereon, to-wit:

6498. U. S. for use of Ludowici-Celadon Co., *et al. vs.* Mankin Cons. Co., *et al.* Assignment of errors. Filed Dec. 9th, 1907. L. B. Moseley, Clerk.

*Appeal Bond.*

UNITED STATES for the Use and Benefit of the LUDOWICI-CELADON COMPANY ET AL.

*vs.*

MANKIN CONSTRUCTION COMPANY ET AL.

Know all men by these presents, that we, Edwin T. Mankin and Henry M. Magie, co-partners, and The Title Guaranty & Surety Company, formerly the Title Guaranty & Trust Company, of Scran-

ton, Pennsylvania, a corporation, principals, and the United States Fidelity & Guaranty Company, surety, are held and firmly bound unto the United States of America in the full and just sum of $5,000.00, to be paid to the said United States of America, its certain attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Whereas, lately at a Circuit Court of the United States for the Southern District of Mississippi, in a suit depending in said Court between the United States of America, for the use of the Ludowici-Celadon Company, the J. L. Mott Iron Works and the N. O. Nelson Manufacturing Company, plaintiff, and Edwin T. Mankin and Henry M. Magie, co-partners, doing business under the firm name and style of Mankin Construction Company, and The Title Guaranty and Surety Company, formerly The Title Guaranty & Trust Company of Scranton, Pennsylvania, a corporation, defendants, a judgment was rendered against the said defendants in favor of the said plaintiff for the use of the Ludowici-Celadon Company, for $1217.78; for the use of the J. L. Mott Iron Works for $709.97; for the use of the N. O. Nelson Manufacturing Company for $2129.47; and the said defendants, having obtained a writ of error and filed a copy thereof in the Clerk's office of the aforesaid Court, to reverse the said judgment, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit, to be holden in the City of New Orleans, on the 7th day of January next.

Now, the condition of the above obligation is such that if the said Edwin T. Mankin and Henry M. Magie and The Title Guaranty & Surety Company, formerly the Title Guaranty & Trust Company of Scranton, Pennsylvania, defendants, as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make the said plea good, then the above obligation to be void else to remain in full force and virtue.

Witness our signatures this 31st day of December, 1907.

EDWIN T. MANKIN.
HENRY M. MAGIE.
THE UNITED STATES FIDELITY & GUARANTY CO.,
By R. C. WILKERSON,
*General Agent.* [SEAL.]
THE TITLE GUARANTY & SURETY COMPANY,
By W. F. HALSTEAD, [SEAL.]
*Vice-President.*

Attest:
J. H. LAW, *Secretary.*

The above bond is hereby approved, this 10th day of January, 1908.

H. C. NILES, *Judge.*

The above and foregoing has the following indorsement thereon, to-wit:

U. S. of America, for the use of Lidowici-Celadon Co., *vs.* Mankin Construction Co., *et al.* Appeal Bond. Filed and ent'd Jan. 10, 1908. L. B. Moseley, Cl'k.

*Agreement of Counsel in Regard to Transcript.*

UNITED STATES for the Benefit of LUDOWICI-CELADON COMPANY ET AL.

*vs.*

MANKIN CONSTRUCTION COMPANY ET AL.

Agreement of Counsel.

It is hereby stipulated and agreed by and between counsel for the plaintiffs and defendants in the above entitled cause, that the following papers filed therein shall constitute the transcript of record to be filed in the Circuit Court of Appeals in pursuance of the writ of error heretofore obtained by the defendants, to-wit:

1. Petition of complainant without any portion of exhibit except contract and bond.
2. Petition of J. L. Mott Iron Works as intervener, without exhibit.
3. Petition of N. O. Nelson Manufacturing Company as intervener without exhibit.
4. Order permitting intervention of J. L. Mott Iron Works Company.
5. Order permitting intervention of N. O. Nelson Manufacturing Company.
6. Plea of defendants.
7. Agreed statement of facts by and between all parties, by their attorneys of record, including copy of contract between W. E. Smythe and the Mankin Construction Co.
8. Judgment of November 12th, omitting order setting aside judgment of November 5th.
9. Motion for new trial (November 12th).
10. Order overruling motion for new trial (Nov. 12).
11. Order allowing 30 days to prepare bill of exceptions (November 12th).
12. Bill of exceptions.
13. Petition for writ of error.
14. Order allowing writ of error.
15. Writ of error.
16. Citation of defendants in error.
17. Assignment of error.
18. Appeal bond.

It is expressly stipulated and agreed that no point shall be made or advantage taken, because of the omission from the transcript of record of any papers or proceedings had in this cause other than those above enumerated, but that they shall constitute the full transcript of record as aforesaid.

Witness our signatures this 13th day of December, 1907.

CATCHINGS & CATCHINGS,
*Att'ys for Defendants.*

W. C. BOWMAN,
*Att'y for Plaintiff.*

REED & BRANDON,
*Att'ys for Interveners.*

The above and foregoing has the following indorsement thereon, to-wit: 6498. U. S. for use of Ludowici-Celadon Co., *et al.*, *vs.* Mankin Cons. Co., *et al.* Agreement As to What Shall Constitute Transcript of Record.

*Clerk's Certificate.*

I, L. B. Moseley, clerk of the Circuit Court of the United States in the Fifth Circuit and the Southern District of Mississippi, do hereby certify that the above and foregoing is a true and correct transcript of so much of the record, assignments of error and proceedings had in Cause No. 6498, wherein the United States for the use & benefit of the Ludowici-Celadon Company, *et al.*, is plaintiff, and The Mankin Construction Company, *et al.*, are defendants, as has been agreed upon by the parties plaintiff and defendant herein, shall constitute such transcript.

Witness my signature and the seal of said Court, at Jackson, in said district, on this the 3rd day of January, A. D. 1908.

[SEAL.] L. B. MOSELEY, *Clerk.*

And thereafter the following further proceedings were had in said cause in said Circuit Court of Appeals of the United States, viz:

November Term, 1907.

(Extract from Minutes.)

*Submission.*

MARCH 25, 1908.

No. 1762.

EDWIN T. MANKIN ET AL.
*vs.*
LUDOWICI-CELADON CO. ET AL.

On this day this cause was regularly called, and was submitted to the court on record and briefs.

*Opinion.*

Filed 31 day of M'ch, 1908. Charles H. Lednum, Clerk of the U. S. Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1762.

EDWIN T. MANKIN ET AL.
*vs.*
UNITED STATES for the Use of the LUDOWICI-CELADON COMPANY ET AL.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

Before Pardee, McCormick and Shelby, Circuit Judges.

By the COURT: The judgment of the Circuit Court is affirmed on authority of Hill *v.* American Surety Company of New York, 200 U. S. 197.

November Term, 1907.

(Extract from Minutes.)

*Judgment.*

No. 1762.

EDWIN T. MANKIN ET AL.
*vs.*
LUDOWICI-CELADON CO. ET AL.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiffs in error, Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, and The Title Guaranty & Surety Company, and the surety on the writ of error bond herein, The United States Fidelity & Guaranty Company, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

March 31, 1908.

*Petition for Writ of Error and Order Thereon.*

United States Circuit Court of Appeals for the Fifth Circuit.

EDWIN T. MANKIN and HENRY M. MAGIE, Co-partners, Doing Business under the Firm Name of Mankin Construction Company; THE TITLE GUARANTY & SURETY COMPANY, and THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiffs in Error,

*vs.*

UNITED STATES for the Use and Benefit of LUDOWICI-CELADON COMPANY, J. L. MOTT IRON WORKS, and THE N. O. NELSON MANUFACTURING COMPANY, Defendants in Error.

Petition for Writ of Error.

Your petitioners, Edwin T. Mankin and Henry M. Magie, co-partners doing business under the firm name of Mankin Construction Company, the Title Guaranty & Surety Company, and the United States Fidelity & Guaranty Company, plaintiffs in error in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a judgment has therein been rendered on the 31st day of March, 1908, affirming a judgment of the Circuit Court of the United States for the Southern District of Mississippi, and that the matter in controversy in said suit exceeds One Thousand Dollars ($1000.), besides costs, and that the jurisdiction of none of the courts mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states, and that this cause does not arise under the patent laws nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be allowed them in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

EDWIN T. MANKIN,
HENRY M. MAGIE,
TITLE GUARANTY & SURETY COMPANY,
UNITED STATES FIDELITY & GUARANTY COMPANY,
By J. J. LEAKE AND
O. W. CATCHINGS,
*Attorneys for Plaintiffs in Error.*

The foregoing petition is granted and writ of error allowed as prayed for, upon plaintiffs in error, or any one of them, giving bond, according to law, in the sum of Six Thousand Dollars ($6,000.00).

May 5th, 1908.

DON A. PARDEE,
*Presiding Judge of the Circuit Court of Appeals of the 5th Circuit.*

The foregoing has the following indorsements:

No. 1762. Edwin T. Mankin *et al.*, Plaintiffs in Error *vs.* United States for use etc., Defendants in Error. Petition for Writ of Error & Order. Filed 30 day of April 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

*Assignment of Errors.*

United States Circuit Court of Appeals for the Fifth Circuit.

EDWIN T. MANKIN and HENRY M. MAGIE, Co-partners, Doing Business under the Firm Name of Mankin Construction Company; THE TITLE GUARANTY & SURETY COMPANY, and THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiffs in Error,

*vs.*

UNITED STATES for the Use and Benefit of LUDOWICI-CELADON COMPANY, J. L. MOTT IRON WORKS, and THE N. O. NELSON MANUFACTURING COMPANY, Defendants in Error.

And now come the plaintiffs in error, Edwin T. Mankin and Henry M. Magie, co-partners doing business under the Firm name of Mankin Construction Company, the Title Guaranty & Surety Company, and the United States Fidelity & Guaranty Company, by J. J. Leake and O. W. Catchings, their attorneys, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause and in the rendition of the final judgment therein manifest error has intervened to the prejudice of the said plaintiffs in error, in this, to-wit:

*First.* Because the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the United States Circuit Court for the Southern District of Mississippi.

*Second.* Because the said Circuit Court of Appeals erred in not reversing the judgment of said Circuit Court and in not ordering said Circuit Court to enter judgment for the plaintiffs in error.

*Third.* Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Southern District of Mississippi for the United States of America for the use of Ludowici-Celadon Company for the sum of $1217.78; for the United States of America for the use of J. L. Mott Iron Works, for the sum of $707.97; and for the United States of America for the use of the N. O. Nelson Manufacturing Company, for the

sum of $2129.47, and costs of suit entered on the 12th day of November, 1907, in favor of said defendant in error and against said plaintiffs in error.

*Fourth.* Because the said Circuit Court of Appeals erred in not holding and declaring that the said Circuit Court erred in granting at the request of the defendants in error upon the trial the instruction, which reads as follows:

"The Court instructs the jury to find for complainants."

*Fifth.* Because the said Circuit Court of Appeals erred in not holding and declaring that the said Circuit Court erred in refusing to grant upon the trial as requested by the plaintiffs in error, the instructions which reads as follows:

"The Court instructs the jury to find for the defendants."

*Sixth.* Because the said Circuit Court of Appeals erred in not holding and declaring that the said Circuit Court erred in refusing to grant upon the trial, as requested by the plaintiffs in error, the instruction, which reads as follows:

"The Court instructs the jury that the defendants are not liable beyond the sum owing by the Mankin Construction Company to W. E. Smythe at the time it received notice of the claims of petitioners and intervenors against the said Smythe, viz: $644.57."

*Seventh.* Because the said Circuit Court of Appeals erred in not holding and declaring that the said Circuit Court erred in overruling and denying the motion of the plaintiffs in error for a new trial.

*Eighth.* Said Circuit Court of Appeals erred in rendering judgment against the plaintiffs in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Wherefore the said Edwin T. Mankin and Henry M. Magie, copartners doing business under the firm name of Mankin Construction Company, the Title Guaranty & Surety Company, and the United States Fidelity & Guaranty Company, plaintiffs in error, pray that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiffs in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Southern District of Mississippi, with instructions to grant a new trial in said cause; or for such further proceedings in said case as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

J. J. LEAKE,
O. W. CATCHINGS,
*Attorneys for Plaintiffs in Error.*

The foregoing has the following indorsements to-wit:

No. 1762. Edwin T. Mankin *et al.*, Plaintiffs in Error *vs.* United States for use etc., Defendants in Error. Assignment of Errors. Filed 30th day of April 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you or some of you, between Edwin T. Mankin and Henry M. Magie, co-partners doing business under the firm name of Mankin Construction Company, the Title Guaranty & Trust Company, and The United States Fidelity & Guaranty Company, plaintiffs in error, and United States for the use and benefit of Ludowici-Celadon Company, J. L. Mott Iron Works, and The N. O. Nelson Manufacturing Company, defendants in error, a manifest error hath happened, to the great damage of said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the 5th day of May, in the year of our Lord One Thousand Nine Hundred and Eight.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
*Clerk of U. S. Circuit Court of Appeals for the Fifth Circuit.*

Allowed by

DON A. PARDEE,
*Presiding Judge U. S. Circuit Court of Appeals for 5th Circuit.*

[Endorsed:] 1762. Edwin T. Mankin *et al.* Plaintiffs in Error *vs.* United States for use etc. D'f'd't in Error. Writ of Error. Filed 5 day of May 1908 Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the defendants in error, 5th day of May 1908.

CHARLES H. LEDNUM, *Clerk.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States for the use and benefit of Ludowici-Celadon Company, J. L. Mott Iron Works, and the N. O. Nelson Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Edwin T. Mankin and Henry M. Magie, co-partners doing business under the firm name of Mankin Construction Company, the Title Guaranty & Trust Company, and the United States Fidelity & Guaranty Company, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Don. A. Pardee, Presiding Judge of the United States Circuit Court of Appeals for the Fifth Circuit this 5th day of May, in the year of our Lord One Thousand Nine Hundred and Eight.

DON A. PARDEE,
*Presiding Judge of the United States Circuit Court of Appeals for the Fifth Circuit.*

We, the undersigned attorneys of record for the defendants in error in the above entitled cause, hereby accept service of a copy of the above citation and enter our appearance as attorneys for the defendants in error as aforesaid.

GERARD BRANDON,
RICH'D F. REED,
W. C. BOWMAN,
*Attorneys for Defendants in Error.*

[Endorsed:] 1762 Edwin T. Mankin *et al.* Plaintiffs in Error *vs.* United States for the use etc. D'f'd't in Error. Citation. Filed 5 day of May 1908 Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

*Writ of Error Bond.*

Know all men by these presents that we, Edwin T. Mankin, Henry M. Magie and the Title Guaranty & Surety Company (formerly the Title Guaranty & Trust Company of Scranton, Penna,), as principals, and the Fidelity & Deposit Company of Maryland as surety are held and firmly bound unto the United States of America for the use and benefit of the Ludowici-Celadon Company, N. O. Nelson Manufacturing Company, and J. L. Mott Iron Works, in the full and just sum of Six Thousand Dollars ($6,000.00), to be paid

to the said United States of America for the use of the Ludowici-Celadon Company, N. O. Nelson Manufacturing Company, and J. L. Mott Iron Works, its certain attorneys or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of May, in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas lately at a Circuit Court of Appeals for the Fifth Circuit in a suit depending in said Court, between Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, the Title Guaranty & Trust Company of Scranton, Penna., and the United States Fidelity & Guaranty Company, plaintiffs in error, and the United States of America for the use and benefit of the Ludowici-Celadon Company, N. O. Nelson Manufacturing Company, and J. L. Mott Iron Works, defendants in error, a judgment was rendered against the said Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, the Title Guaranty & Trust Company of Scranton, Penna., and the United States Fidelity & Guaranty Company, plaintiffs in error as aforesaid, and the said Edwin T. Mankin and Henry M. Magie, the Title Guaranty & Trust Company of Scranton, Penna., and the United States Fidelity & Guaranty Company, plaintiffs in error as aforesaid, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America for the use and benefit of the Ludowici-Celadon Company, N. O. Nelson Manufacturing Company, and J. L. Mott Iron Works, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington thirty days from the date of the signing of the said citation, now the condition of the above obligation is such that if the said Edwin T. Mankin and Henry M. Magie, doing business under the firm name of Mankin Construction Company, the Title Guaranty & Trust Company of Scranton, Penna., and the United States Fidelity & Guaranty Company, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

EDWIN T. MANKIN.
HENRY M. MAGIE.
THE TITLE GUARANTY & SURETY COMPANY,
By B. P. KEATING, *Vice-President.*
Attest: J. H. LAW, *Secretary.* [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.,
By P. M. MILNER, *Local Director.*
Attest: CHAS. H. BLACK, *General Agent.* [SEAL.]

Sealed and delivered in presence of,
J. JORDAN LEAKE, As to E. T. Mankin.
SELLERS MONROE, As to H. M. Magie.

Approved by
DON A. PARDEE,
*Judge of the United States Circuit*
*Court of Appeals for the 5th Circuit.*

The foregoing has the following indorsements to-wit:
No. 1762. Edwin T. Mankin *et al. vs.* The United States for the use etc. Writ of error bond. Filed 22 day of May 1908. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals for the Fifth Circuit.

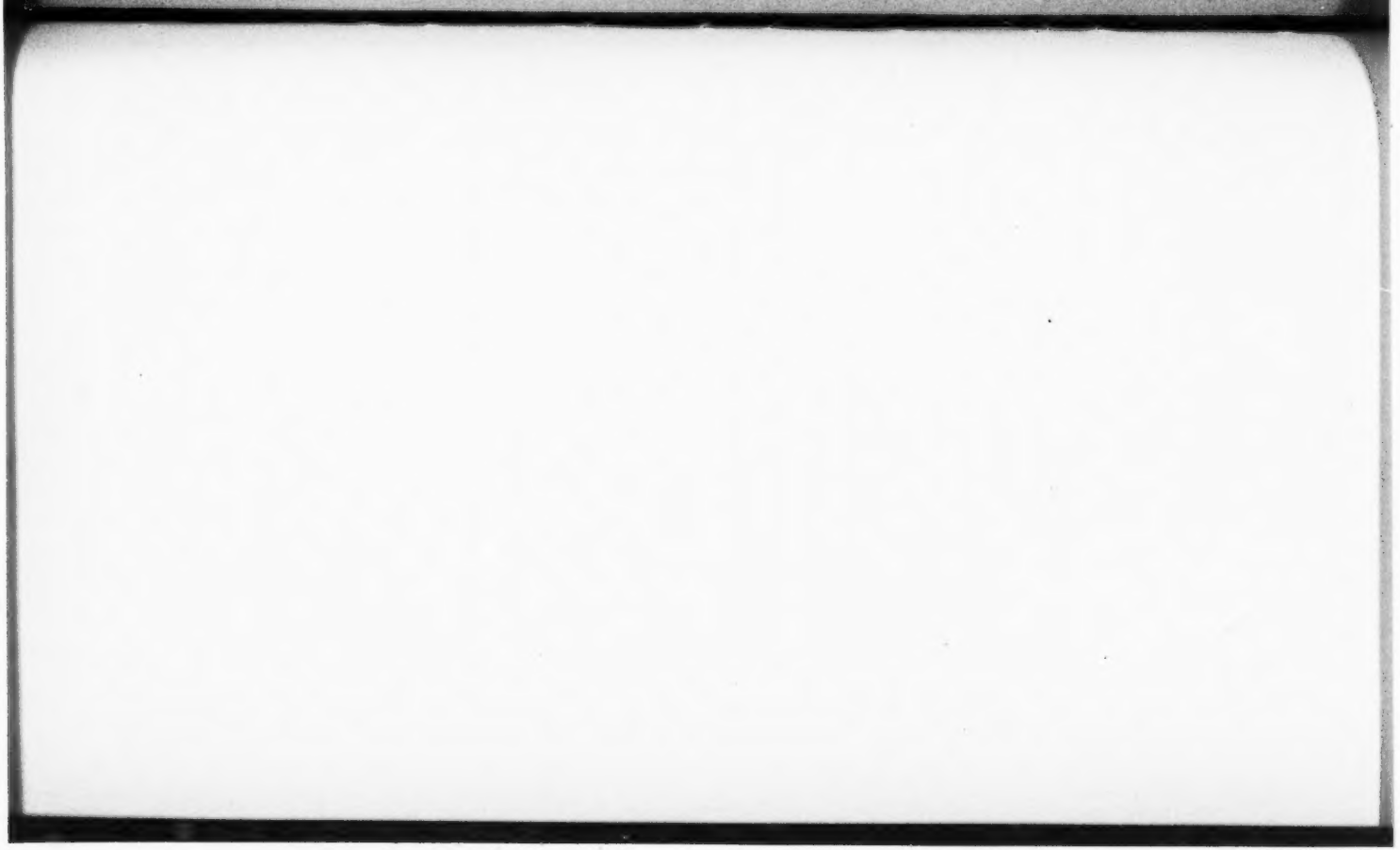
I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 64 pages, numbered from A to 63, inclusive, contain a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had and done, including the opinion of the Court, in the case of Edwin T. Mankin, *et al.*, plaintiffs in error, *versus* The United States, for the use etc., defendants in error, No. 1762, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 22nd day of May A. D. 1908.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
*Clerk of the United States Circuit Court*
*of Appeals for the Fifth Circuit.*

Endorsed on cover: File No. 21,196. U. S. circuit court of appeals, 5th circuit. Term No. 413. Edwin T. Mankin and Henry M. Magie, co-partners, doing business under the firm name of Mankin Construction Company, *et al.*, plaintiffs in error, *vs.* The United States for the use and benefit of Ludowici-Celadon Company, J. L. Mott Iron Works, and The N. O. Nelson Manufacturing Company. Filed May 27th, 1908. File No. 21,196.



Office Supreme Court, U. S.
FILED.
OCT 26 1908
JAMES H. McKENNEY,
CLERK

# BRIEF OF DEFENDANTS IN ERROR

## SUPREME COURT OF THE UNITED STATES

### OCTOBER TERM, 1908.

### No. 167.

EDWIN T. MANKIN AND HENRY M. MAGIE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF MANKIN CONSTRUCTION COMPANY, ET. AL., PLAINTIFFS IN ERROR.

*vs.*

THE UNITED STATES FOR THE USE AND BENEFIT OF LUDOWICI-CELADON COMPANY, J. L. MOTT IRON WORKS AND THE N. O. NELSON MANUFACTURING COMPANY.

IN ERROR FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1908.

## No. 413.

EDWIN T. MANKIN AND HENRY M. MAGIE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF MANKIN CONSTRUCTION COMPANY, ET. AL., PLAINTIFFS IN ERROR.

*vs.*

THE UNITED STATES FOR THE USE AND BENEFIT OF LUDOWICI-CELADON COMPANY, J. L. MOTT IRON WORKS AND THE N. O. NELSON MANUFACTURING COMPANY, DEFENDANTS IN ERROR.

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IN ERROR FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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This suit, originating in the Circuit Court of the United States for the Southern District of Mississippi (and thence appealed to the U. S. Circuit Court of Appeals, from whose judgment an appeal is taken to the Supreme Court) is based upon, and was instituted in ac-

cordance with the provisions of an Act of Congress, approved Aug. 13, 1894, entitled, "An Act for the protection of persons furnishing materials and labor for the construction of public works," and of An Act approved Feb. 24th, 1905, and entitled: An Act to amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled, "An Act for the protection of persons furnishing materials and labor for the construction of public works." See said Acts.

Said amended Act, to which the Court is here respectfully referred, provides. First—"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, and the *additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract;* and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States." It further provides for the proceedure to be observed and

followed by persons desiring to take advantage of the provisions above quoted.

In the case of the United States for the use of Hill vs. American Surety Company, Volume 26, Supreme Court Reporter, page 168, and which is the leading and latest case construing the above mentioned statute, the Supreme Court of the United States has decided as per syllabus of said case, as follows: "Labor and materials used in the prosecution of a public work, whether furnished under the contract directly to the contractor or to a sub-contractor, must be deemed within the obligation of a surety company under a bond executed pursuant to the Act of August 13, 1894 (28 Stat. at L. 278, Chap. 280, U. S. Comp. Stat. 1901, p. 2523), conditioned for the prompt payment of the contractor to 'all persons supplying it labor or materials in the prosecution of the work provided for in said contract,' in view of the manifest purpose of that statute to protect those whose labor or material has contributed to the prosecution of the work." The opinion of the Circuit Court of Appeals was brief and to the point, as follows: "The judgment of the Circuit Court is *affirmed* on the authority of Hill vs. American Surety Company of New York, 200 U. S. 197, (See Transcript of Record, page 52)

The appellant Mankin Construction Company, subsequent to the passage of the above cited Act of Congress, entered into a contract with the United States of America for the construction and completion, in accordance with the provisions thereof, of a Post Office building in the City of Natchez. This contract, dated Feb. 27, 1905, appears on pages No. 6 to No. 11 of the Transcript of Record.

Pursuant to the requirements of statute, the Mankin Construction Company executed a bond with the appellant, The Title Guaranty & Trust Company, as surety in the penal sum of $17,000.00, conditioned according to law, and especially conditioned that said Mankin Construction Company, *"shall promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract."* This bond, dated March 2, 1905, appears on pages 12 and 13 of the transcript. The said principal contractor, Mankin Construction Company, subsequently entered into a sub-contract with one W. E. Smythe, a contractor and plumber, for the construction and erection of certain parts of said building, and which contract necessitated the furnishing by said Smythe of all the necessary materials and labor for the completion of his said sub-contract. The contract between W. E. Smythe and Mankin Construction Company appears on pages 36 to 41 of the Transcript of Record.

The appellees, Ludowici-Celadon Company, N. O. Nelson Mfg. Co. and The J. L. Mott Iron Works, respectively, furnished to the sub-contractor W. E. Smythe *materials which were used in the prosecution of the work contemplated by said original contract* between the Mankin Construction Company and the United States; *and which were used in and upon the said Post Office building* being constructed by the Mankin Construction Company. See agreed statement of facts, Transcripts of Records, page 34.

The value of the goods and materials so furnished by said apellees, respectively, is shown by the Record and it is admitted as a fact that they were so furnished and that the appellees were not paid for the same. See Transcript of Records, page 34.

Pursuant to the provisions of said Act of Congress, and strictly in accordance therewith, the original proceedings were instituted by the Ludowici-Celadon Company, and upon notice, and still in pursuance of said statute, the appellees, N. O. Nelson Mfg. Company and The J. L. Mott Iron Works filed their petitions as intervenors, leave of the Court so to do having been first sought and obtained. To the petitions of appellees, the appellants filed a plea of general issue.

There was no testimony taken in the lower Courts, the facts in the case being undisputed. And the case was tried and submitted to the Court upon the pleadings and the agreed statement of facts, which appears on pages 33, 34, and 35 of the transcript of the record. In said statement it is expressly agreed that there was owing to the appellees the amounts claimed by them respectively, excepting Eleven and 54-100 ($11.54) Dollars, received by Ludowici-Celandon Company from the trustee of Smythe in bankruptcy. The amounts for which judgment was rendered were with interest the same as specified in the agreed statement of facts.

Upon the verdict of the Jury, the Court rendered judgment against the appellants for the amounts claimed by appellees, respectively, with interests and costs of Court, from which judgment the appellants have appealed to this Court.

## BRIEF AND ARGUMENT.

The principles of law involved in this case have been fully and clearly decided by this most august and learned of human tribunals, the Supreme Court of the United States in the above mentioned case of *United States for the Use and Benefit of Hill vs. American Surety Company,(See Supreme Ct. Reporter, Vol. 26, p. 168 et seq., and 200 U. S. p. 197.)* And in addition to this the facts in that case and this are so similar that the opinion of this court rendered in that case is applicable to every legal question that we can conceive of being raised in this. In fact we cannot conceive of a clearer or stronger argument being made in behalf of appellees than that furnished by the opinion of Mr. Justice Day rendered in the above cited case. We therefore quote said opinion as follows:—

"This case was decided on demurrer in the Court below. It was held that no cause of action was stated by the plaintiffs, and judgment was rendered accordingly Plaintiffs brought action as partners against the American Surety Company upon a bond given in pursuance of the Act of August 13, 1894, 28 Stat. at L., 278, chap. 280 U. S. Comp. Stat. 1901, p. 2523. The allegations of the petition, so far important as to be noticed here are: The defendant is a corporation duly authorized to do a general insurance and bonding business. On Feb. 14, 1901, the New Jersey Foundry & Machine Company entered into a written contract with the United States for the construction of four observation towers, for the agreed compensation of $2,575. That, among other things, it was stipulated in the contract "that the said New Jersey Foundry & Machine Company shall be re-

sponsible for and pay all liabilities incurred in the prosecution of the work for labor and material," the work to be completed within seven months from date of contract. The United States required of the said New Jersey Foundry & Machine Company a bond, which was executed by the company and the American Surety Company as surety, on the 14th day of February, 1901, in the penal sum of $4,000, to be paid unto the United States of America, which bond contained the condition: 'Now, therefore, if the above bounden New Jersey Foundry & Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed and covenanted by said New Jersey Foundry & Machine Company to be observed and performed, according to the true intent and meaning of said contract, and as well during any period of extention of said contract that may be granted on the part of the United States, as during the origiual terms of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.' That afterwards the said New Jersey Foundry & Machine Company entered into a contract with the Richard Manufacturing Company for certain portions of the work, and said Richard Manufacturing Company entered upon the performance of the contract, and in the performance thereof between the 3d day April and the 17th day of May, of the same year, Daniel H. Hill,and Howard H. Hill, the plaintiffs, at the special instance and request of the said Richard Manufacturing Company,

scraped and painted the four observation towers, to be constructed under the contract with the said New Jersey Foundry & Machine Company, for which said Richard Manufacturing Company agreed to pay the said plaintiffs the sum of $246.80, of which there is unpaid the sum of $141.80. That on the 11th day of August 1903, the plaintiffs made the affidavit required by the statute, and procured from the Secretary of War of the United States certified copies of the original contract and bonds; that the said New Jersey Foundry & Machine Company, the Richard Manufacturing Company, and the United States accepted the said Scraping and painting so done and performed by the plaintiffs in the necessary prosecution of the work required by the original contract.

"The statute under consideration is entitled 'An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works.' It provides, in substance, that persons entering into formal contracts with the United Stated for the construction or repair of public buildings and works shall be required, before performing such work, to execute the usual penal bond with good and sufficient surety, with the additional obligation 'that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract.' The statute further provides for the furnishing of a copy of the contract and bond to persons furnishing an affidavit that labor and materials for the prosecution of such work have been supplied by him or them, and giving a right of action in the name of the United States for the benefit and use of said person or persons against the contractor and his sureties.

"'We may remark, before considering the construction to be given this act, that it has been materially amended by the act of February 24, 1905, 33 Stat. at L. 811, Chap. 778. The amended act makes provisions for preference in payment in favor of the United States, limits the time in which actions may be brought, provides for bringing all the creditors into one action, and for the prosecution of the same in the name of the United States in the circuit courts of the United States in the district in which the contract was to be performed, and not elsewhere. In respect to the persons entitled to the benefit of the bond, there has been no material change in the act. While not governing the present action, the amended statute has some bearing in construing the act in question, *as it shows the consistent purpose of Congress to protect those who furnish labor or material in the prosecution of public work.*

"'In considering the statute and determining the scope of the bond, divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed, and a recovery limited to those who have furnished material or labor directly to the contractor, and, upon the other, that a more liberal construction be given, and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

"This statute was before this court in *United States Fidelity & G. Co. vs. Golden Pressed & Fire Brick Co.* 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142, and while the question whether surety

companies which are such for compensation are entitled to the same strict construction of their rights and obligations as is accorded to private sureties, who become such without reward or profit, was left open, it was nevertheless said: 'The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the snb-contractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a sub-contractor, as was the case in *United States use Heise vs. American Bonding & T. Co.* 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking.'

"The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of building to be owned and enjoyed by those who profit by the contribution of such labor or materials. *Flagstaff Silver Min. Co. vs. Cullins*, 104 U. S. 176, 177, 26 L. ed. 704, 705. And the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language

used and circumstances surrounding the parties *Ulster County Sav. Inst. vs. Young,* 161 N. Y. 23, 30, 55 N. E. 483.

"As against the United States, no lien can be provided upon its public buildings or grounds, *and it was the purpose of this act* to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual. The purpose of the law is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works.' If literally construed, the obligation of the bond might be limited to secure only persons supplying labor and materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end.

"Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *United States vs. Freeman,* 3 How. 556, 11 L. ed. 724. 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of the implication may be called in to aid that intent.' Chief Justice Marshall, in *Durosseau vs. United States,* 6 Cranch, 308, 3 L. ed. 232.

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same congressional purpose to require payment for material and lobor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affiant to state the labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made, and such persons are given the right of action on the bond in the name of the United States Lan uage could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor *but all persons* supplying the contractor with labor or materials in the p'osecution of the work provided for in the contract *are to be protected.* The source of the labor or material is not indicated or circumscribed. It is only required to be '*supplied*' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"'If a construction is given to th bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for owing to the default of sub-contractors, and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated.

"*We cannot conceive that this construction works any hardship to the surety.* The contractor gets the benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done, and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are insured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure. In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or material in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. *If the contractor sees fit,* to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfilment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

"We reach the conclusion that the labor and materials furnished in this case were within the obligation of the surety company on the bond, and in that view *the judgment of the Superior Court is reversed* and the cause remanded for further proceedings not inconsistent with this opinion."

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## AS TO THE POSITION TAKEN BY THE PLAINTIFFS IN ERROR AND THEIR ASSIGNMENTS OF ERROR.

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We have not before us a brief filed in behalf of the Plaintiffs in Error; if any has been filed a copy has not been sent us. We are therefore compelled to anticipate the character of their argument and contention, and assume that (if they are consistent) it will be similar to if not the same as in the Circuit Court of Appeals.

Plaintiffs in Error have very gravely contended that the "*question*" in this case is whether a person supplying materials to a sub-contractor in the construction of a public building for the United States is within the meaning of said Act of Congress a person supplying them to the principal contractor. We submit that if there ever was such a "*question*" it no longer exists for this Court has clearly and unequivocally answered it in the affirmative in said case of Hill vs. American Surety Co.

Plaintiffs in Error have further contended that, even if the first question is answered in the affirmative, there arises the "*further question*" of whether the liability of the principal contractor and of the surety on his bond

is limited to the amount in his hands owing to the sub-contractor at the time the principal contractor receives notice from the person furnishing labor or materials to the sub-contractor. We respectfully submit that in Hill vs American Surety Co., this court has by the whole tenor of its opinion (if not in express words) decided that there is no such limitation of liability either in favor of the principal contractor or his surety.

If the lawmakers contemplated any such limitation it would have appeared in the statute. It does not so appear, but on the contrary. There is no provision for giving notice to either the principal contractor nor his surety by any person supplying the sub-contractor. There is no provision for reaching or holding any funds either in the hands of the principal contractor or in the hands of the United States.

We hardly imagine Plaintiffs in Error will contend that there is any such limitation as to the liability of the surety in case the principal contractor had not the money in hand to pay a person supplying him direct. Then, inasmuch as the statute as construed by this court wipes out the distinction between contractor and sub-contractor, and is intended to protect the *person who furnishes the materials*, regardless of whether he furnishes to the principal contractor or the sub-contractor, with what degree of logic and reason can they draw a distinction in the case before the court. And this construction works no hardship on the principal contractor, for, in the language of this Court already quoted in Hill vs. American Surety Co. "It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond or

otherwise, for the payment of such persons as furnish work or materials to go into the structure."

The contention of Plaintiffs in Error for such limitation upon the liability of the principal contractor and his surety is opposed to the spirit of the United States Statute upon which we rely, to the spirit of the decision of this court, and to the policy of the government. The intention and object of the statute is clearly evidenced in the policy of our government that it will not receive or become the owner of any public building or work for which the persons furnishing material or labor have not been paid. The government itself will not in such case consent to be sued or garnished; hence said act of Congress, which provides the remedy for such persons, and imposes upon the principal contractor and the surety on his bond the duty and obligation to see that all labor and materials are paid for. As already indicated, the principal contractor and his surety can secure protection by requiring proper bonds of sub-contractors and in other ways; there is no obligation, either express or implied, imposed upon the persons supplying the sub-contractor to give any notice to the principal contractor. To admit the contention of Plaintiffs in Error would practically nullify the act of congress.

The decision of this court in Hill vs American Surety Co., has had the effect of closing a loophole through which surety companies upon the bonds of government contractors might escape from the liability which they assume and for which they are paid a premium. It emphasizes the fact that the liability on such bonds is not nominal or imaginary, but real and actual. The decision in Hill vs. American Surety Company was of vital interest

to the great surety companies of this country. Yet so clear, and so unequivocal is that decision and the facts so identical with those in this case, that we cannot escape the conclusion that the surety companies interested in this case are asking this Court to reverse its own decision in Hill vs. American Surety Co.

The cases cited by Plaintiffs in Error have no weight in this instance. They are all (we believe) decisions of State Courts or of the lower Federal Courts. They have no weight in the scales as against the opinion of this court in the latter and leading case of Hill vs. American Surety Co.

It is unnecessary to discuss or reply to seriatim the Assignments of Error. They are one and all dependent upon the correctness of the contentions of Plaintiffs in Error which we have just discussed. These contentions being opposed to the law as contained in the Act of Congres and as construed by this court, said Assignments of Error, one and all, necessarily fall of their own weight.

This case has been tried, both in the Circuit Court and in the Court of appeals, *upon an agreed statement of facts.* (See Transcript of Record, pp. 33 and 34.) Upon these facts and the law applicable thereto the instruction given by the Circuit Court, "that the jury find for the complainants", was correct, and in accordance with the decision of this court.

The case is one which the Acts of Congress are intended to cover. There existed the contract with the United States, the bond and surety contemplated by the statute, materials were furnished and used in the post-office building, the amount claimed by appellees for said materials was due, owing and unpaid, and the facts undisputed.

The procedure required by the statutes was strictly complied with in every detail and particular, There was no question of jurisdictional amount, and we do not understand that there is any now. In this case the amount in suit aggregates several thousand dollars. In the above cited case of U. S. for use of Hill vs. American Surety Co., the indebtedness in controversy was only $141.80.

The Circuit Court *did not err* in refusing the instruction that the defendants (plaintiffs in error) "are not liable beyond the sum owing by the Mankin Construction Co., to W. E. Smythe at the time it received notice of the claims of petitioner and intervenors against said W. E. Smythe, viz., $644 57."

The remedy of the person furnishing labor or materials is purely statutory. Such person has no lien against the government building for labor or matetials furnished. Such person cannot garnishee the United States or by any legal proceedings reach or tie up the contract money in the hands of the government.

Therefore the question of notice is not in the slightest degree pertinent to this case. The statute contains no provisions for notice. It does not in any of its provisions contemplate a notice. The statute does not give any remedy against the sub-contractor nor provide for tying up his funds in the hands of the principal contractor. Some of the State statutes provide for the giving of notice in order to render the principal contractor liable for the debts of the sub-contractor for labor and materials. But this suit was not brought under a State statute, but under the Federal Statutes cited. Here again the principal contractor, Mankin Con-

struction Company could have protected themselves or did protect themselves and the surety on their bond by requiring a similar bond of the sub-contractor Smythe.

If Congress had intended that notice should be given in order to protect one furnishing materials or labor through a sub-contractor, the statute would have so provided. But it does not so provide. Neither does it appear in the case of U. S. for use of Hill vs. American Surety Company, that such notice was given, nor does the opinion of Justice Day indicate in the slightest degree that such notice was required or necessary.

The Mankin Construction Company knew, they necessarily knew, that the materials for the price of which this suit was brought, were being used by their sub-contractor Smythe in and upon the government building. This of itself gave them ample notice. It was their duty ( knowing of the statute and of the conditions of their bond ) to inquire of Smythe and to satisfy themselves that he had paid for all materials used before settling with him. As we have already said, and as Justice Day has said, they could even have gone to the extent of requiring Smythe to give bond to protect them against loss.

There was no law for the instruction asked for noted in appellants' fourth exception. There was no equity in it. And we respectfully urge that the lower court *did not err*, but properly refused said instruction.

## IN CONCLUSION.

In Conclusion, we respectfully submit that the law and the facts in this case, will satisfy this court that the lower courts did not err in any respect whatsoever, but that the judgments therein rendered were clearly within the law and the facts and in harmony with the opinion of this Court in Hill vs. American Surety Co., that defendants in error are entitled to the relief they have sought, and that the lower courts should be affirmed, and this appeal be dismissed at the cost of plaintiffs in error.

Respectfully submitted,

C. H. ALEXANDER,
of Jackson, Miss.

W. C. BOWMAN,
of Natchez, Miss.

RICH'D. F. REED,
of Natchez, Miss.

GERARD BRANDON,
of Natchez, Miss.

Solicitors and Council for all the
Defendants in Error.

Supreme Court, U. S.
FILED.
DEC 28 1909
JAMES H. McKENNEY
CLERK

# No. 167.

IN THE

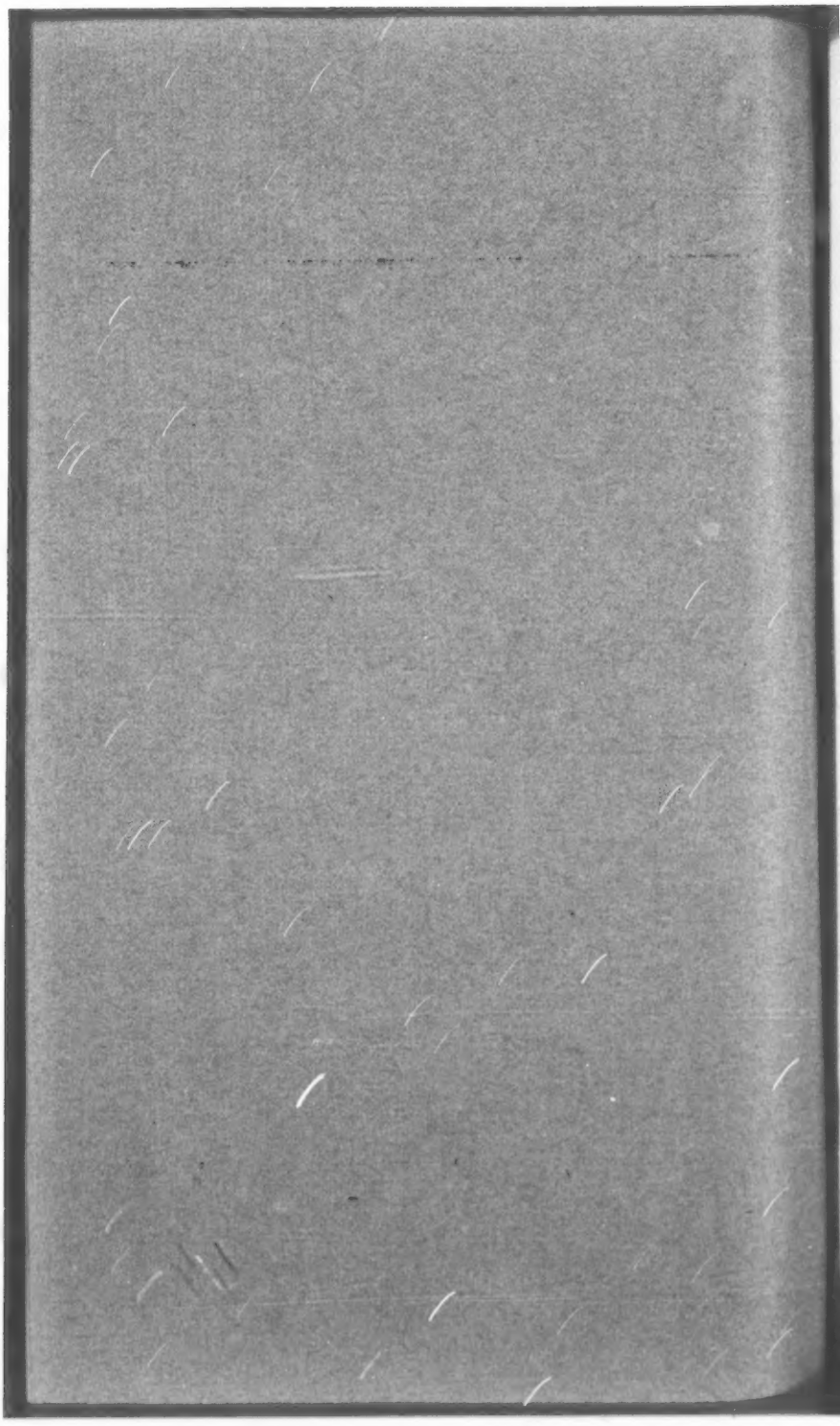
# Supreme Court of the United States

EDWIN T. MANKIN AND HENRY M. MAGIE, DOING BUSINESS UNDER THE FIRM NAME OF MANKIN CONSTRUCTION COMPANY, AND THE TITLE GUARANTY AND TRUST COMPANY,
PLAINTIFFS IN ERROR,

*versus*

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE LUDOWICI-CELADON COMPANY, PLAINTIFF, N. O. NELSON MANUFACTURING COMPANY AND J. L. MOTT IRON WORKS, INTERVENORS,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.



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*versus*

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE LUDOWICI-CELADON COMPANY, PLAINTIFF, N. O. NELSON MANUFACTURING COMPANY AND J. L. MOTT IRON WORKS, INTERVENORS,
DEFENDANTS IN ERROR.

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BRIEF FOR PLAINTIFFS IN ERROR.

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The writ of error in this cause is to a judgment of the United States Circuit Court of Appeals for the Fifth Circuit (page 52), affirming the judgment of the Circuit Court of the United States for the Southern District of Mississippi, entered on the 12th day of November, 1907, in favor of the plaintiffs in a cause

therein pending under the style of United States, for the use and benefit of Ludowici-Celadon Company, plaintiff, against Edwin T. Mankin, and Henry M. Magic, of Richmond, Virginia, co-partners, doing business under the firm name of Mankin Construction Company and the Title Guaranty and Trust Company of Scranton, Pennsylvania, a corporation duly incorporated under the laws of Pennsylvania, defendants. Record, page 30.

## Statement of the Case.

The facts in this case were all agreed upon in the lower court, see pages 33, 34 and 35, and are as follows:

Edwin T. Mankin and Henry M. Magic, partners doing business under the firm name of the Mankin Construction Company, of the City of Richmond, Virginia, plaintiffs in error, entered into a written contract on the 27th day of February, 1905, with L. M. Shaw, Secretary of the Treasury, for and in behalf of the United States of America for the construction, erection and completion, etc., of the United States Post Office building in the City of Natchez, Mississippi, a copy of which contract may be found on page 6 of the printed Record, it being filed as an exhibit with the petition of the complainants. In pursuance of the Act of Congress, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13th, 1894, as amended by an act of February 24th, 1905, said plaintiffs in error as principals, together with the Title Guaranty and Trust Company of Scranton, Pennsylvania, plaintiff in error, as surety, executed a bond unto the United States of America in the penal sum of seventeen thousand ($17,000.00) dollars, conditioned as required by said Act of Congress. Copy of said bond will be found on page 12 of the Record. Said Mankin and Magic, partners as aforesaid, on April 29, 1905, entered into a written contract with one W. E. Smythe, a contractor and plumber of Natchez, Missis-

sippi, in which written contract said Mankin and Magie, trading as the Mankin Construction Company, were designated as the general contractor, and said W. E. Smythe was designated as the sub-contractor. By the terms of this contract the said W. E. Smythe agreed to furnish all necessary materials for the plumbing, gas-fitting, heating, sheet metal work, tile-roofing, etc., in the construction and erection of said building. A copy of said last named contract may be found on page 36 and following of the Record.

The said Post Office Building was duly completed, and on or about July 12, 1906, was accepted by the United States Government, and payment therefor was made by the United States to said Mankin Construction Company in accordance with said contract.

The defendants in error, the Ludowici-Celadon Company, the N. O. Nelson Manufacturing Company and the J. L. Mott Iron Works, respectively, sold and delivered to said W. E. Smythe, sub-contractor under said Mankin Construction Company as aforesaid, certain materials, which were purchased of said respective defendants in error by said Smythe and used by said Smythe as sub-contractor as aforesaid in the construction of and in and upon the said Post Office building, and are now in and upon and form part and parcel of said Post Office building.

The said Smythe failed to make full payment to the said respective defendants in error for the purchase price of said materials, and no suit having been brought by the United States under said Act of Congress within six months from the completion and final settlement of said contract between the United States and said Mankin Construction Company for the construction of said building, said Ludowici-Celadon Company having made the affidavit required by said Act of Congress that it had supplied materials for the prosecution of the work of constructing said building, and that payment therefor had not been made, was thereupon furnished by the United States with a

certified copy of said contract between the United States and said Mankin Construction Company, and of the said bond, and at May term, 1907, instituted an action in the name of the United States in the Circuit Court of the United States for the Southern District of Mississippi, for its use and benefit against said Edwin T. Mankin and Henry M. Magie, partners trading as the Mankin Construction Company, contractors, and said Title Guaranty and Trust Company, their sureties, on said bond, claiming the right to maintain said action by virtue of the provisions of said Act of Congress as amended as aforesaid. See Agreed Statements of Facts on page 33 and following of Record, and the Petition of said Ludowici-Celadon Company on page 2 and following of Record.

The defendant in error, the J. L. Mott Iron Works, intervened in said action for the purpose of recovering from said plaintiffs in error the amount due it by said Smythe as aforesaid, claiming the right to so intervene under said Act of Congress. Likewise the defendant in error, the N. O. Nelson Manufacturing Company, intervened in said action for the purpose of recovering from said plaintiffs in error the amount due it by said Smythe for materials furnished as aforesaid, claiming likewise the right to intervene under the provision of said Act of Congress as amended.

It is admitted that at the date of the filing of their respective petitions and accounts in this action, said W. E. Smythe had not paid anyone of said three petitioners for the materials furnished by them as aforesaid and used by him as aforesaid, but was indebted to them in the respective amounts claimed by them in their said petitions and itemized accounts exhibited and filed therewith. It is further admitted, however (see additional Agreed Statement of Facts on page 35 of Record), that said Mankin and Magie, trading as Mankin Construction Company, had paid the said Smythe the full amount due him by them on account of the contract between them, except the sum of six hundred forty-four dollars and fifty-seven cents ($644.57) prior

to receiving any notice from either the said plaintiffs, or either of said intervenors, of their respective claims above mentioned against said Smythe.

The defendants pleaded the general issue in the said action and upon the Agreed Statement of Facts above mentioned this case was submitted. Whereupon, at the request of the plaintiffs, the court instructed the jury to find for the complainants. The defendants objected to the giving of this instruction, but the objection was overruled by the court and the instruction given, and the defendants excepted to the action of the court in giving this instruction. The defendants requested the court to give the following instructions:

*First:* "The court instructs the jury to find for the defendants."

*Second:* "The court instructs the jury that the defendants are not liable beyond the sum owing by the Mankin Construction Company to W. E. Smythe at the time it received notice of the claims of petitioners and the intervenors against the said Smythe, viz., six hundred forty-four dollars and fifty-seven cents ($644.57)."

The court refused to give these instructions asked for by the defendants, and the defendants excepted to the action of the court in refusing said instructions and each of them. See page 42. Thereupon the jury found for the petitioner and intervenors for the respective amounts claimed by them with legal interest. Whereupon the defendants moved the court to set aside the verdict and grant a new trial, because:

*First:* The court erred in granting the instructions asked for by the plaintiffs.

*Second:* The court erred in refusing instructions asked for by the defendants.

*Third:* The verdict is contrary to law.

*Fourth:* The verdict is contrary to the evidence.

This motion was overruled by the court, and the defendants excepted to this action of the court in overruling said motion, and tendered their bill of exceptions, which was duly signed and sealed and made a part of the Record. See pages 42 and 43 of the Record.

From said judgment a writ of error was obtained by the plaintiffs in error to the United States Circuit Court of Appeals for the Fifth Circuit. This latter court affirmed the judgment of the trial court, whereupon a writ of error was obtained from this court.

## Argument.

As the contract in this case was made on February 27, 1905, and as this cause was instituted at the May term, 1907, of said trial court, the rights of the parties depend upon the terms and provisions of the statute of the United States, adopted February 24, 1905, 33 U. S. Statutes, page 811.

That statute first requires that any person entering into a contract with the United States for the construction of any public building, etc., shall "execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract," etc., etc.

It then provides for any person so supplying labor or material to intervene in any suit which may be instituted upon said bond by the United States.

It further provides:

> "If no suit be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materals, shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action," etc., etc.

The plaintiffs in error insisted in the lower courts:

*First:* That, under the terms of said statute, the defendants in error were not empowered to institute this suit.

*Second:* That even if the defendants in error are among those authorized to bring such suit, they, as suppliers of materials to a sub-contractor, were only entitled to recover whatever balance the contractor had not previously paid to the sub-contractor before receiving any notice of any claim of the said suppliers of material to the sub-contractor.

They here respectfully insist upon the same two defenses.

If they are right in their first position, the trial court erred in refusing the first instruction prayed for by them.

If they are right in their second position, the trial court erred in refusing the second instruction, prayed for by them.

On the other hand, the defendants in error, claim that the plaintiffs in error are wrong in both positions, and insist that both of those two questions were decided in their favor by this court in the case of *United States, for the use, etc., of Hill* v. *American Surety Company*, 200 U. S. p. 197.

In reply to that contention, the plaintiffs in error insist:

*First:* That the decision does not apply to this case, for the reason that it involved the construction of the Act of Congress

of August 13, 1894, in which the language is different from that of the Act of February 24, 1905, which is here under consideration.

*Second:* That that decision did not pass upon the question of *how much* a supplier of material to a sub-contractor could recover, but only decided that he was entitled under the former act to sue on the bond.

That case undoubtedly arose under the earlier statute, and this court in deciding the case was called upon to construe the terms and provisions of that statute only. It is true that, while so construing said earlier statute, this court incidently remarked that the scope of the two statutes was the same as to who were embraced in its terms.

But we respectfully submit that that remark was *obiter dictum* and was not intended to have the effect of a binding construction of the later statute.

If this view be correct, and we submit that it is, then the construction of the later statute is an open question. Being thus an open question we ask the court's attention to the difference between the two statutes.

The opinion of this court in that case shows that there is no specific reference in the earlier statute to the suppliers of material to sub-contractors, but that they were held to be embraced within the indefinite terms of that statute, as it did not state to whom the materials were to be delivered or furnished. It was held that, as the act did not specifically designate to whom such materials were to be furnished, such suppliers of materials to sub-contractors were to be regarded as embraced in its broad terms.

In that case this court said:

> "There is no language in the statute, nor in the bond, which is therein authorized, limiting the right of recovery to those who furnish material or labor directly to the contractor."

It is in this very respect that it is submitted that the later statute differs from the earlier one. That such a difference

exists can be seen from the quotation above made from the later act. That quotation shows that the *only* persons, who are authorized under this *later act* to obtain a copy of the contractor's contract and bond, and to institute a suit thereon, are "the person or persons supplying *the contractor* with labor and material."

Thus this later statute, under which this suit was brought, clearly and specifically designates who are empowered to bring a suit upon the required bond. Hence, in this most material feature, the later statute differs from the earlier act, which in the former case was under the consideration of this court.

What is the effect of this clear distinction and difference?

Under the ordinary rule of construction such an expression as that embraced in the statute excludes all other claimants. But under every recognized rule of construction statutes similar to the one under consideration require a stricter construction than that ordinarily put upon statutes.

The statute under consideration was declared by this court in the case heretofore noticed to be intended to take the place of statutes authorizing mechanics' liens. See page 203, U. S. 200. Hence, it should be construed at least with as much strictness as are mechanic lien statutes.

We submit that it should be construed with greater strictness, because in the case of mechanic lien statutes, they only furnish relief against the owner of the property, who received the benefit of th labor and material expended and put upon his property; while under the statute here considered, the party sought to be held liable is a surety, whom the law never recognizes as bound to respond to any one, who is not clearly embraced in the specific classification named in the bond.

But treating the act as similar to a mechanics' lien statute, and to be similarly construed, it is submitted, that by the rules of such construction the defendants in error were not authorized by the said later statute to institute this suit.

By those rules of construction it is recognized that no one is held to be embraced within the terms of such statutes, unless

it clearly appears therein that they are embraced within its terms.

In Phillips Mech. Liens, section 36 (2nd Ed.), it is said:

> "The party seeking to avail himself of its privileges must clearly show that he is of the class protected by its terms. There is no equity in the labor he has performed or materials he has contributed to the improvement of the estate, that will enable the courts to extend to a party the benefits conferred upon those meritorious."

This principle is fully discussed in Phillips Mechanics' Liens (2nd Ed.), section 47, 48, 49, 50. See *Wood* v. *Donaldson*, 17 Wend. 550, and *Donaldson* v. *Wood*, 22 Wend. 395. See also Boisot Mech. Liens, sections 246 to 252 and 253; *McGuire* v. *Ohio R. Rd. Co.*, 33 W. Va. 63.

In this later statute, it appears that, not only is it said, that the "additional obligation" in the bond shall be "that such contractor or contractors shall promptly make payments to all persons supplying *him or them* with labor and materials," but it also declares who may sue on said bond—those "supplying *the contractor* with labor and materials." Accepting these declarations in the ordinary meaning of the words used, it is submitted that those who supply the sub-contractor with labor and material cannot be held to be those in the language of the statute as "supplying the contractor."

It is respectfully submitted that under the terms of the later statute the defendants in error were not authorized to bring this suit, and that the trial court erred in refusing to give the first instruction prayed for by the plaintiffs in error, as set forth on page 42, Record.

Should the court hold that the position above insisted upon is erroneous, then we ask the court's consideration and determination of the second defence made in the lower court, viz., that, if the defendants in error can enforce any claim against the said bond given as above stated, their recovery must be

limited to the amount of balance unpaid to the sub-contractor, W. E. Smythe, at the time the plaintiffs in error received notice of the claims of the defendants in error. In the "Additional Agreed Statement of Facts" it is admitted that that balance amounted to six hundred forty-four dollars and fifty-seven cents, page 35. Previous to such notice the plaintiffs in error had, in accordance with their contract with said Smythe, paid him the rest of the amount due upon said contract for the goods purchased by said Smythe, as it now appears, from the defendants in error.

This question, in the light of the above agreed facts, resolves itself into the enquiry, whether, by the express terms of the statute, by its spirit, or by the general policy of the laws upon such subject, the plaintiffs in error should be required to pay a *second* time for the material furnished by the defendants in error to the said Smythe, or whether the defendants in error should be limited in their recovery against the plaintiffs in error to the balance, which had not been paid to the said Smythe.

This second question is the only one which is of any importance to the plaintiffs in error. The first question is more or less academic as to them. It was only raised as a defence by the plaintiffs in error because of the large amounts claimed by the defendants in error against the said bond. Doubtless if the defendants in error had in their pleadings only claimed a right to such unpaid balance due upon the Smythe contract, the plaintiffs in error would not have made any contest, but would have come into court and paid in such unpaid balance for the trial court to distribute as it might see fit. The plaintiffs in error have no interest in such balance, and would have made no effort to prevent the defendants in error from acquiring the same in such manner as the trial court might have decreed. But the plaintiffs in error were forced to make the first defence, because of the large sums which the defendants in error attempted to make them pay *twice*.

Considering this question as one of general equity and justice,

and not as one arising out of a statute, it is evident that one would naturally say, that it would be unreasonable and unjust, to require the plaintiffs in error to pay again to those with whom they had no dealings, and of whom probably they had no knowledge, large sums of money which the plaintiffs in error had previously and honestly paid to those with whom they had contracted to pay, with the knowledge of those who now come forward and demand a second payment.

If such a course would be against what is called natural justice, then its justification can only be found in the requirement of some statute. But if it be against natural justice, it is not probable that it should be found in a statute. Hence, in order to hold that a statute contains such requirement, it must be necessary that it shall clearly appear in the language of such statute.

Before, however, examining either of the two statutes above mentioned, it may be well to see whether this question is, as contended by the defendants in error, *res adjudicata*, by the decision of this court in the case of *"United States, for the use, etc., of Hill* v. *American Surety Company," supra.* We submit that in that case, not only no such question arose, but also, that no such question could have arisen. A cursory examination of the case will show that no such question did arise.

In that case no evidence was taken, for it was decided upon the single pleading, setting up the claim of the suppliers of material to the sub-contractors to sue on the bond required, and upon the demurrer of the defendant contractor to said pleading. The ground of the demurrer was that the plaintiffs in that case had no right to sue on said bond. That was the sole defence, so far as appears from the report of the case, and that was the sole question discussed and decided in that case. This court only decided that certain persons had a right to sue on the bond required.

On page 199, this court said:

> "This case was decided on demurrer in the court below. It was held that no cause of action was stated

by the plaintiffs, and judgment was rendered accordingly."

This court did not decide, nor even intimate, what was the extent of that right, or how far it was limited.

There was no such question in the case. They asserted a certain sum as due for supplies furnished. But it nowhere appears in that case whether the defendant had in hand the whole amount promised the sub-contractor, or whether he held too small a balance of said amount to meet in full the amount sued for by the plaintiff.

Hence, we submit, that as such question, as is presented by the case at bar, was absent from that case, the court could not have intended to decide such a question, and did not decide it.

Insisting then that this question is an open one, we submit, that, from the terms of the statute, from its spirit, and from the generally recognized policy of the law in such matters, the defendants in error can only be entitled to claim the balance of six hundred forty-four dollars and fifty-seven cents, still unpaid upon the contract of Smythe, the sub-contractor.

Looking first at the terms of the statute, there can not be found therein any language which bears upon the question here at issue. Indeed, this court recognized, in the said case of *United States, who sues for, etc., Hill* v. *American Surety Company, supra,* that there were no words in the earlier statute of August 13, 1894, which specifically mentioned or referred to such suppliers of material to sub-contractors. The court held them rather to be embraced in the purview of the statute by the spirit of the statute. They were declared to be so embraced by construction—by ascertaining the object and spirit of the statute.

It will not be contended that the language of the later statute of February 24, 1905, shows any stronger indication of embracing such suppliers of material to a sub-contractor within its scope. In truth, as we have shown above, they are excluded by the terms of the last mentioned statute.

If they are to be held as embraced within the scope of the statute, by looking at its spirit, then, we submit that their rights should be so limited as not to work an injustice to the obligors in the bond required. It is equally within the power of this court to say to what extent such spirit of the statute gives the right of recovery. It cannot be said that the spirit of the statute ever contemplated making said obligors pay *twice* for materials received. Such a result should be declared not from the spirit of a statute, but only from the clear and express mandate of a statute.

"So far as the statute has the effect of compelling the owner to pay more than he has agreed to pay, or to pay his debt twice, it is highly penal and should be strictly construed in his favor. Those who seek to inflict upon him a penalty for his failure to comply with the terms of the law must show clearly that the dereliction has occurred. The law must be construed against the exaction of the penalty if in reason it can be." *West Coast Lumber Co.* v. *Knapp*, 122 Cal. 81; *Hampton* v. *Christenson*, 84 Pac. 200-201. See *Alderman* v. *Hartford, etc. Co. et al.*, 66 Conn. 47; *Nixon* v. *Cydon Lodge No. 5, etc.*, 56 Kan. 298; *Dunn, etc.* v. *Rankin & Co.*, 27 Ohio, 132; *Morrison* v. *Whaley*, 16 Rh. I. 715.

This question has twice arisen, under the statutes of two States. In each case the liability was limited to the balance unpaid upon the contract with the sub-contractor.

A New Jersey statute, 2 General Statutes, 1709 to 1895, page 2078, provides for a lien upon the money contracted to be paid for the construction of a public improvement. In *Garrison* v. *Borio, etc.*, 47 Atlantic Reporter, page 1060, the question arose as to the right of a supplier of materials to a sub-contractor to a lien against the money due by the general contractor. It was claimed that the lien existed notwithstanding the fact that the general contractor had substantially paid the sub-contractor all that was due him on his contract. Evans was the general contractor, Borio and Stelacio, the sub-contractors, and Garrison, the supplier of stone to said sub-contractors.

The court said:

"Evans accepted his contract with the municipality subject to the preference given such claims under the existing law. But Evans, having, by his contract with Borio and Stelacio, been entitled to pay them for the very materials for furnishing which the claim is made by Garrison, and having actually fully paid them before any lien notice was actually filed by Garrison, has no further liability for this statutory preferred claim; nor can the contract price unpaid to him by the municipality be held to pay it. In short, my view of the true construction of the statute is that the statute will support a lien for material furnished to a sub-contractor and used in the building, but when the original contractor, at a time when no lien notice was on file, has once paid a sub-contractor for material furnished and used in the building under a contract, he has discharged the unpaid contract price from liability to lien for those materials, and he cannot be compelled to pay over again for the same materials. The stone furnished by Mr. Garrison to Borio and Stelacio had been paid for to them by Evans long before Mr. Garrison filed his lien notice. This is in substance, the construction given by the Supreme Court of New York to the same statute. In *Brainard* v. *Kings Co.*, 84 Hun. 290, the creditors of a sub-contractor filed a lien for work performed by them for the sub-contractor. It was held that they must show that the contractor was indebted to the sub-contractor in some amount, and that this amount was the extent of their lien."

The Bainard case was affirmed in 155 N. Y. 538.

In Phillips Mech. Liens (2nd Ed.), section 61, page 103-104, citing *Renton* v. *Conley*, 49 Cal. 188, it is said:

"Where a lien is given, 'whether labor is done at the instance of the owner or his agent, and every contractor shall be held to be the agent of the owner,' notwithstanding the broad language of the statute, where the

owner has made payments to the contractor in good faith and in pursuance of the contract, before receiving notice, actual or constructive of the liens, the sub-contractor could not charge the building with a lien, exceeding the balance of the contract price remaining unpaid when the notice of the lien was given."

See also *McKnight Bros.* v. *Washington*, 8 W. Va. 666; *Stout's Admr.* v. *Golden*, 9 W. Va. 231; *McIntire* v. *Barnes*, 4 Col. 288.

Among the good reasons which may be given for this rule is the following one, given in Phillips Mechanics' Liens (2nd Ed.), section 62, page 103:

"Unless there is some provision of the statute to the contrary, an owner may make payments due by the tenor of his contract, before notice is received. Sub-contractors are usually required to take notice of the terms of the principal contract and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract, unless notified of claims for materials before such payments are due."

*Stewart* v. *Wright*, 52 Iowa, 335; *Craig* v. *Smith*, 37 N. J. L. 549; *Reeve* v. *Elmendorf*, 38 N. J. L. 125.

If such be the well recognized rule as to the right of a sub-contractor, surely the same rule should be applied with greater force and more strictly to a supplier of materials to a sub-contractor, as we have seen that the law does not look with as much favor upon the last named class as it does upon the former.

In the same text writer, in section 49, page 76-77, it is also said, when discussing what would be the evil effect of the converse of the principle above stated:

"It would be unsafe in that case for the principal contractor to make any payments or advances to the sub-contractors who had undertaken to do particular portions of the work, until their several jobs were completed, and they had furnished to him conclusive

> evidence that all the journeymen and laborers employed by them respectively had been paid in full; and the various sub-contractors would have to raise money some other way to pay such journeymen and laborers, or those who actually did the work would have to wait until the contract was fulfilled, so that they and the sub-contractor could be paid off by the original contractor at the same time—the probable effect of which would be to suspend the payments of the daily pittance which the journeyman frequently wants for the immediate use of himself and family," etc., etc. Phillips Mechanics' Liens (2nd Ed.), section 49, page 76-77.

In Boisot Mechanics' Liens, section 255, it is said:

> "The lien of a material man in the third degree is subject to a double limitation. It cannot exceed the amount due or to become due from the owner to the original contractor when the lien accrued."

To hold otherwise, than as announced in the above authorities, would be failing to recognize the theory upon which such liens are allowed. That theory is announced in *Wadsworth* v. *Hodge*, 88 Ala. 500-503, where it is said:

> "The lien is created rather by the law than by the contract of the parties. It is analogous to the vendor's lien, and is based upon a like reason—that it is unconscionable for a vendee to retain a vendor's property and not pay the stipulated price for it."

But it is not unconscionable to refuse to pay for such materials twice. Nor is it unfair for the obligors in a bond to refuse to pay for such, when they have already been paid for once.

It is difficult, and in some instances impossible for a general contractor to ascertain when the material has not been paid for by the sub-contractor. He has to depend upon such information

as he can get from the sometimes unknown supplier or upon the sub-contractor. Frequently he cannot protect himself, as he has to depend upon others. On the other hand, such a supplier of material can always protect himself by giving notice to the general contractor. He can thus secure himself as to any amount unpaid at the time he shall give notice to the general contractor. Not to require him to give notice would be to encourage him to keep silent until the sub-contractor has been paid. He would be safe as to his claim, and he would not be apt to antagonize his patron, the sub-contractor, by unnecessarily causing the general contractor to hold up the money due to the sub-contractor. In other words, it would encourage fraud, which it would be difficult to expose. Such an unjust result was severely denounced in re Hobbs & Co., 145 Fed., on page 218.

It is also manifest that, to allow a supplier of materials to a sub-contractor to remain quiet until the sub-contractor has been fully paid, and then come forward and demand another payment to him, must ultimately be very disastrous as to contracts requiring such bonds. As soon as such a ruling should become known to the bonding companies, it would be very difficult to get them to go upon such bonds, or it would cause them to demand largely increased premiums for the unknown risks to which they would thereby be subjected.

A bonding company in going upon such bonds only takes into consideration the risk of the failure of its principal to pay his debts arising from the contract. It knows who he is, his means and his character. Upon that knowledge it decides whether or not it will take the risk.

But if hereafter, the bonding company, in addition to such *known* risk, is to be required to assume also all the *unknown* risks arising from the possibility of the several unknown sub-contractors failing to meet their obligations as to material or labor purchased by them, it is but reasonable to expect it to increase its premiums to compensate for such additional and unknown risks.

Hence, we repeat, that such a ruling would ultimately result in the placing of a useless and unjust risk upon many transactions which should be encouraged, and not hampered. On the other hand, by allowing the suppliers of material or labor to the sub-contractor to have a claim only against the balance due the sub-contractor at the time of notice to the general contractor, it would be treating such suppliers fairly, it would be preventing fraud, and would inform the bondsman as to what would be the extent of his risk as surety on the bond.

We submit that every reason calls for the adoption of the rule suggested by us—especially as such is the general policy of the laws upon this subject.

In Phillips Mechanics' Liens (2nd Ed.), section 61, page 99, it is said:

> "The system most generally adopted for the security of sub-contractors and materialmen is that which confines their right of recovery to the amount due the contractor by the owner at the time of notice to the latter."
>
> See also Ibid, section 36, page 56; and section 49.

And in section 62, page 101, the reason for this rule is stated as follows:

> "The law only subrogates the sub-contractor, *pro tanto*, to the rights of the contractor under the contract, and he can, except in cases of fraud, collusion, or intent to evade the act, have no other or greater rights."

This same rule should apply for the same reason to a claim set up against a general contractor by a supplier of material to a sub-contractor. Otherwise, a general contractor might be required to pay to the suppliers of material to a sub-contractor more even than he agreed to pay to the sub-contractor himself.

That the general policy of the statutes is as stated above can be seen from the following authorities:

*McMury* v. *Brown*, 91 U. S. 257-266.
*Wolf & Co.* v. *Penn. R. R. Co.*, 29 Pa. Sup. Ct. 439.
*Knelly* v. *Howarth*, 208 Pa. 487.
*Mulliken* v. *Harrison*, 44 S. E. 426.
*Gridley* v. *Sumner*, 43 Conn. 14.
*Alabama Lumber Co.* v. *Smith*, 35 So. 693.
*Merriott* v. *Cra[illegible] Co.*, 126 Ill. App. 337-343.
*American Surety Co.* v. *United States*, 127 Ala. 349.
*General Supply Co.* v. *Hunn*, 126 Ga. 615.
*Vandenberg* v. *Walton & Co.*, 92 Pac. 149.

See also Alexander's Lien Laws Southeastern States, Alabama, page 35; Florida, page 114; Mississippi, page 435; North Carolina, page 474; South Carolina, page 525; Virginia, page 694.

In noticing the principle announced in the New York case, of *Brainard* v. *King Co., supra*, it was said in *Hunter* v. *Truckee Lodge*, 14 Neb. 24-41:

> "The strong leaning of the court in favor of the latter system has been the result of what is probably an enlightened view of the true policy of legislation on this subject; for it seems that the plan of conferring on sub-contractors and material men a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and that the tendency in the later legislation in the various States of the Union is to confine their right to what may be owing by the owners at the time of notice to him of their claims."
>
> See *Fullerton Lumber Co.* v. *Osborn*, 72 Io. 472.

Hence we submit that whether one construes the statute here under discussion by its language, by its spirit, or by the general policy of the statutes upon this subject, the most that the defendants in error were entitled to receive was the six hundred forty-four dollars and fifty-seven cents, the balance which had

not been paid by the plaintiffs in error to the sub-contractor, W. E. Smythe, and that in holding otherwise the trial court, and, afterwards, the Circuit Court of Appeals, erred.

Respectfully submitted,

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